Indian Claims Commission

Lucky Man Cree Nation

Report on: Treaty Land Entitlement Inquiry

March 1997

102-02521/

Indian Claims
Commission

Commission
des revendications
des Indiens

March 27, 1997

Chief and Council
Lucky Man Cree Nation

The Honourable Ron Irwin
Minister of Indian Affairs and Northern Development

The Honourable Allan Rock
Minister of Justice and Attorney General of Canada

Re: Lucky Man Cree Nation
Treaty Land Entitlement

The Lucky Man Cree Nation initiated proceedings before this Commission by letter dated December 13, 1995, from Thomas R. Berger, Counsel for the Lucky Man Cree Nation, to the Indian Claims Commission. The Commission began its work by convening a planning conference on June 18, 1996, where the parties discussed the issues pertaining to this inquiry and the conduct of the inquiry.

This inquiry deals with the issue of outstanding treaty land entitlement pursuant to Treaty 6, for the Lucky Man Cree Nation in Saskatchewan. The Commission has reviewed hundreds of pages of documents related to this inquiry. By agreement of the First Nation and Canada, it was determined that a community session, to hear directly from members of the Lucky Man Cree Nation, was not required for this inquiry. On December 3, 1996, the Commissioners heard oral submissions from legal counsel for the parties.

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Our review of the history of this claim, and our analysis, findings, and recommendation are contained in the attached report which we are now honoured to present to you.

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC Commission Co-Chair	Carole T. Corcoran Commissioner

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE TREATY LAND ENTITLEMENT CLAIM OF THE LUCKY MAN CREE NATION

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March 1997

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PART I

INTRODUCTION

Few events have been more pivotal in Canadian history than the North-West Rebellion of 1885. Although there are differing interpretations of the causes of the rebellion and the involvement of Indian Nations in it, there is no doubt that it had profound repercussions for the Conservative government of the day, as well as for the Indian band that forms the subject matter of this inquiry. On the national stage, the handling of the uprising and the subsequent hanging of Métis leader Louis Riel were significant factors in the federal Tories' eventual fall from grace with the electorate in Québec. At the local level, the rebellion delayed the process of selecting and surveying a reserve for the members of the Lucky Man Band, who appeared to have been on the verge of accepting, albeit reluctantly, that the traditional pursuit of buffalo had ceased to be viable. In the aftermath of the revolt, Lucky Man himself and some of his followers fled to the United States, while others remained on Indian Reserve (IR) 116, which was eventually set apart in 1887. That reserve, surveyed by Dominion Land Surveyor John C. Nelson "For the Bands of Chiefs 'Little Pine' and 'Lucky Man,'"[1] contained 25 square miles (16,000 acres), or sufficient land for 125 people under the Treaty 6 formula of one square mile for each family of five (or 128 acres per person).

The claimant in this inquiry is the Lucky Man Cree Nation,[2] which is at present entitled to the use and benefit of a reserve (the 1989 reserve) comprising 7680 acres located roughly 120 kilometres northwest of Saskatoon and approximately 15 kilometres east of Mayfair, Saskatchewan. This reserve is located within the boundaries of Treaty 6, to which Chief Lucky Man and his followers adhered on July 2, 1879, and constitutes sufficient land for 60 people under Treaty 6. The reserve itself was not formally set apart for the First Nation until a Treaty Land Entitlement Settlement Agreement (the Settlement Agreement) was agreed to by the First Nation and Canada on November 23, 1989. The lands formerly formed part of the Meeting Lake Prairie Farm Rehabilitation Administration Community Pasture, and the sole economic activity on the reserve remains the lease or rental of the land base to area ranchers for grazing purposes.

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[1] Order in Council PC 1151, May 17, 1889 (ICC Documents, pp. 410-12).

[2] Alternatively referred to as "Lucky Man," the "First Nation," or the "Band," depending on the historical context.

Although the Lucky Man Cree Nation agreed to the selection of the 1989 reserve for its future use and benefit, it has nevertheless continued to claim that the reserve is too small to satisfy Canada's treaty obligation to provide reserve land under Treaty 6 and was, at the time of its survey, more than a century overdue. On July 7, 1995, however, Canada rejected the First Nation's request that the claim be accepted for negotiation.[3] As a result, counsel for Lucky Man on December 13, 1995, requested the present inquiry before the Indian Claims Commission (the Commission).[4]

This inquiry boils down to one central issue: what is the appropriate date for calculating the First Nation's population for treaty land entitlement purposes? On the one hand, Lucky Man proposes three alternative dates in the early 1880s. The First Nation claims that, depending on the date of entitlement chosen, and subject to further paylist analysis to quantify more precisely the entitlement population, the acreage of treaty land to which the First Nation is entitled, and the shortfall in treaty land received, are as set forth in Table 1.

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[3] Al Gross, Specific Claims West, Department of Indian and Northern Affairs, to Chief and Council, Lucky Man Cree Nation, July 7, 1995 (ICC Documents, p. 572).

[4] Thomas R. Berger, QC, Berger & Nelson, to Norma Diamond, Director of Liaison and Communications, Indian Claims Commission, December 13, 1995.

Table 1 Lucky Man Cree Nation Treaty Land Entitlement

Year of entitlement	Paylist population	Entitlement (at 128 acres per person)	Acreage received under Settlement Agreement	Shortfall (in acres)
1880	754	96,512	7,680	88,832
1882	872	111,616	7,680	103,936
1883	366	46,848	7,680	39,168

Canada, on the other hand, contends that the only realistic choices are 1980 – the year on which the Settlement Agreement was based – or, in the alternative, the 1887 date of first survey for IR 116. The First Nation's population in 1980 was 60, and in 1887 it was 62. If the latter date is chosen, Canada "would be prepared, should the Band agree, to conduct further research (including a paylist analysis) to determine the Band's actual DOFS [date-of-first-survey] population."[5]

Our task is to review these alternatives and decide which is most appropriate for the purpose of establishing the First Nation's treaty land entitlement.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of this Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where that claim has already been rejected by the Minister. . . ."[6] The role of the Commission in this inquiry is to determine whether the claim of the Lucky Man Cree Nation should be accepted by Canada for negotiation under the Specific Claims Policy. This policy, outlined in the 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government. A lawful obligation specifically includes claims based upon "[a] breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder."[7]

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[5] Submissions on Behalf of the Government of Canada, November 19, 1996, p. 45.

The Commission has *not* been asked to quantify Lucky Man's outstanding entitlement, if any, to treaty land. Rather, in light of the Specific Claims Policy and the historical background set forth in the following section of this report, we are asked to decide the appropriate date for calculating the First Nation's treaty land entitlement. If so, it will be up to the parties to negotiate a settlement of the outstanding entitlement, failing which it will remain open to the First Nation to request a further inquiry before the Commission to address this aspect of the claim.

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[6] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730 (July 27, 1992), amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329 (July 15, 1991).

[7] Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy: Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171-85 [hereinafter *Outstanding Business*].

PART II

THE INQUIRY

In this part of our report, we will review the historical background to the Lucky Man claim. We have derived our factual findings from the documentary evidence forming the record in these proceedings since there was no oral testimony in evidence before us. Although many inquiries involve community sessions to gather relevant information and to provide an opportunity for elders and other members of the community to speak to the Commissioners, the First Nation advised the Commission on July 9, 1996, that a community session would not be necessary in the conduct of this inquiry.

In preparation for the oral submissions in Saskatoon on December 3, 1996, counsel for Canada submitted written arguments to the Commission on November 19, 1996, to which counsel for Lucky Man responded on November 26, 1996. That same day, the Commission released its report on the treaty land entitlement claim of the Kahkewistahaw First Nation.[8] To provide the parties with an opportunity to respond to the Kahkewistahaw report, the Commission invited supplementary written submissions, which were received from Canada on December 8, 1996, and from the First Nation on December 19, 1996. The written submissions, documentary evidence, transcripts, and the balance of the record of this inquiry are referenced in Appendix A of this report.

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[8] Indian Claims Commission, *Kahkewistahaw First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, November 1996).

HISTORICAL BACKGROUND

Treaty 6 and the Lucky Man Band

Throughout the late 1860s and early 1870s, the Plains Cree were growing concerned about increasing encroachments on their territory by white settlers. The great buffalo herds that had once been the cornerstone of Indian culture were vanishing from the prairie. Word had already spread to the Cree that the government had entered treaty negotiations with the Chippewa Indians to the east,[9] and the fact that boundary and railway surveyors were increasingly evident suggested that the Cree could no longer expect to claim the sole right to live on and make use of the vast western landscape. These and other equally ominous factors led some Cree chiefs to consider negotiating treaty with the government to protect their heritage and to assure their future in the new Dominion. The government, too, was anxious to formalize relations with the people of the plains so that the settlement of western Canada could proceed smoothly.

To that end, Treaty Commissioners were appointed in the 1870s by the Government of Canada to negotiate treaties with the Indian nations of the western prairies. The Treaty Commissioners selected in 1876 were Alexander Morris (Lieutenant Governor of Manitoba and the North-West Territories, including present-day Saskatchewan), W.J. Christie (Hudson's Bay Company chief factor), and James McKay (Minister of Agriculture for Manitoba). The three met with Chiefs of the Cree and Assiniboine Nations at Fort Carlton and Fort Pitt.[10]

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[9] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 168 (ICC Exhibit 1).

[10] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 196-244 (ICC Exhibit 1).

These negotiations resulted in a number of Chiefs signing Treaty 6 at or near Fort Carlton on August 23 and 28, 1876, and at Fort Pitt on September 9, 1876. Under the terms of the treaty, the Indian signatories agreed to "cede, release, surrender and yield up" to Canada "all their rights, titles and privileges whatsoever, to the lands included within the . . . limits" of the Treaty 6 area, as well as "all other lands wherever situated, in the North-West Territories, or in any other Province or portion of Her Majesty's Dominions, situated and being within the Dominion of Canada."[11] In exchange, the Indians were promised, among other things, reserve lands, annuities, and farm implements and instruction to ease their transition from a buffalo-based subsistence to an agrarian economy. Of greatest interest in the present inquiry are the following terms of Treaty 6:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say:-
>
> That *the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them.*[12]

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[11] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 352 (ICC Exhibit 1).

[12] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 352-53 (ICC Exhibit 1). Emphasis added.

At the time of treaty, Lucky Man was a headman under the legendary Big Bear, one of the most powerful of the Cree Chiefs who later became known for his strong stands against government attempts to erode native rights and autonomy. Big Bear was not present at the initial treaty negotiations at Fort Carlton and did not arrive at Fort Pitt until September 13, 1876, the final day of treaty talks that year.[13] He appeared without his band, informing the Commissioners that he represented other bands still out on the plains and that he would not sign treaty on their behalf without representatives from those bands being present. As Morris reported, Big Bear stated:

> "I am glad to meet you, I am alone; but if I had known the time, I would have been here with all my people. I am not an undutiful child, I do not throw back your hand; but as my people are not here, I do not sign. I will tell them what I have heard, and next year I will come." About an hour afterwards the Big Bear came to Fort Pitt House to see the Governor, and again repeated that he accepted treaty as if he had signed it, and would come next year, with all his people, to meet the commissioners and accept it.[14]

Several more Cree bands adhered to Treaty 6 in the years that followed. Despite Big Bear's assurance in 1876 that he would consider signing the treaty the following year, he did not sign. Over the next few years, in fact, Big Bear became a leading advocate for revising Treaty 6 to reflect more favourable terms, both for those Indians who had already signed treaty and for those who had not yet adhered.

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[13] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 239-42 (ICC Exhibit 1).

[14] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 242 (ICC Exhibit 1).

Since he had not been present at the initial treaty meetings, he decided to wait and see whether the government would honour its treaty obligations, but in the meantime he tried to negotiate and improve upon what he and other Cree leaders, such as Piapot and Little Pine, perceived to be inadequate treaty provisions. In particular, he sought to obtain Canada's agreement to permit only Indians to hunt buffalo.[15] Big Bear also resisted attempts by the government to have the Crown's law become the exclusive law by which his people were governed,[16] and he sought to preserve and strengthen Indian autonomy and influence. As historian John Tobias states:

> Believing that small reserves were more susceptible to the control of the Canadian government and its officials, Big Bear, Piapot, and Little Pine sought to effect a concentration of the Cree people in an Indian territory similar to the reservation system in the United States. In such a territory the Cree would be able to preserve their autonomy, or at least limit the ability of others to control them; they would be better able to take concerted action on matters of importance to them.[17]

The strong stands taken by Big Bear and other Indian leaders at this time led to the Cree being regarded with a mixture of fear and respect. As Big Bear biographer Hugh Dempsey wrote:

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[15] John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879-1885" (1983) 64 *Canadian Historical Review*, 519 at 523-24.

[16] Olive P. Dickason, *Canada's First Nations* (Toronto: McClelland and Stewart, 1992), 302.

[17] John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879-1885" (1983) 64 *Canadian Historical Review*, 519 at 527.

> Big Bear was not the only chief to protest the lot of the Crees. Little Pine had refused to accept treaty in 1877 because it would mean losing his freedom, and *Piapot*, complaining that the terms of Treaty Four were inadequate, would not take a reserve. Even the peaceful chief Star Blanket was concerned about insufficient help to start farming, while Beardy angrily demonstrated against the low rations. But Big Bear's dramatic appeals at Fort Pitt and Sounding Lake in 1877 and 1878 had made him the symbol of government defiance, both among disaffected Indians and the white people in nearby settlements. To the Cree, Big Bear was a determined, unyielding leader who was trying to unite the Indians and thus negotiate a better deal from the government.[18]

Even Edgar Dewdney, the newly appointed Indian Commissioner for the North-West Territories who later became the lightning rod for Cree disaffection, acknowledged after meeting Big Bear in 1879: "He is a very independent character, self reliant, and appears to know how to make his own living without begging from the Government."[19]

With the spread of settlement and the disappearance of the buffalo, the last quarter of the 19th century represented a time of great social, economic, and spiritual upheaval for the plains Indians. In the years immediately following the initial execution of Treaty 6 in 1876, buffalo became more difficult to find. Big Bear and other Chiefs moved their bands into the Cypress Hills area in southwest Saskatchewan near the border with the United States to be close to the last remaining herds. The Cree bands regularly travelled south across the 49th parallel into the United States in pursuit of the great beasts.

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[18] Hugh A. Dempsey, ***Big Bear: The End of Freedom*** (Vancouver: Greystone Books, 1984), 86-87.

[19] Hugh A. Dempsey, ***Big Bear: The End of Freedom*** (Vancouver: Greystone Books, 1984), 90.

American authorities viewed Canadian Indians as troublesome and sought to prevent them from crossing the border and inciting unrest among American Indians and settlers. In particular, the U.S. government believed that these incursions would adversely affect its attempts to settle American Indians on reserves. The American military harassed the Cree when they crossed the border, chasing them out wherever possible. Initially, Canadian authorities were not opposed to the Cree crossing the border in search of food. They believed that eventually the depletion of buffalo stocks, together with the government's continued promotion of farming, would persuade Canada's Indians to enter treaty and take reserves. In the meantime, since Canadian authorities also believed that any problems with Canadian Indians in the United States were related to the scarcity of buffalo, they requested that the Americans allow hunting within their borders:

> The Canadian Government is making great exertions to settle their Indians and to induce them to become herdsmen and to cultivate land and raise supplies of food for themselves, but in the meantime and until this is accomplished Half-Breeds and Indians alike depend upon the chase, particularly of the Buffalo, for subsistence. . . .[20]

Despite exhaustive efforts by the Cree, buffalo hunts became increasingly inconsistent and unproductive. Consequently, some members of Big Bear's Band began to question his strategy of refusing to adhere to treaty, believing that the benefits of treaty might alleviate some of the hardships they were facing. Adhering to treaty, some felt, would at least secure annuity payments, with which they could purchase some provisions for their struggling families. As Tobias notes, Commissioner Dewdney was ready and willing to use the situation to his advantage:

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[20] Report of the Privy Council, Minister of the Interior, September 22, 1879, National Archives of Canada [hereinafter NA], RG 10, vol. 3652, file 8589-1 (ICC Documents, pp. 13-14).

> The new Indian Commissioner quickly sought to use rations as a means of getting control over the Cree. In the fall of 1879 he announced that rations were to be provided only to Indians who had taken treaty. To get the Cree into treaty more easily and to reduce the influence of recalcitrant leaders, Dewdney announced that he would adopt an old Hudson's Bay Company practice of recognizing any adult male Cree as chief of a new band if he could induce 100 or more persons to recognize him as leader. He expected that the starving Cypress Hills Cree would desert their old leaders to get rations. As a means of demonstrating Canada's control over the Cree, Dewdney ordered that only the sick, aged, and orphans should receive rations without providing some service to one of the government agencies in the West.
>
> Dewdney's policies seemed to work, for when the Cree and Assiniboine who had gone to hunt in Montana returned starving, their resolve weakened. Little Pine's people convinced their chief to take treaty in 1879, but when Big Bear refused to do the same, almost half of his following joined Lucky Man or Thunderchild to form new bands in order to receive rations.[21]

Twenty lodges splintered off from the Big Bear Band, and, on July 2, 1879, at Fort Walsh, Lucky Man signed an adhesion to Treaty 6 as their new Chief.[22] The adhesions signed by Lucky Man and Little Pine stated:

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[21] John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879-1885" (1983) 64 *Canadian Historical Review*, 519 at 526-27.

[22] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 366 (ICC Exhibit 1).

> And whereas, the said Commissioner [Dewdney] has recognized the said Little Pine as the head man of his Band, and the said band of twenty lodges have selected and appointed Pap-a-way the Lucky Man, one of their number, as the head man of their band, and have presented him as such to the said Commissioner, who has recognized and accepted him as such head man;
>
> Now, this instrument witnesseth that the said Little Pine and Pap-a-way, or the Lucky Man, for themselves and on behalf of the bands which they represent, do transfer, surrender and relinquish to Her Majesty the Queen, her heirs and successors to and for the use of her Government of the Dominion of Canada, all their right, title and interest whatsoever, which they have held or enjoyed, of, in and to the territory described and fully set out in the said treaty [6]; also all their right, title and interest whatsoever to all other lands wherever situated, whether within [the] limits of any other treaty heretofore made or hereafter to be made with Indians or elsewhere in Her Majesty's territories, to have and to hold the same unto and for the use of Her Majesty the Queen, her heirs and successors forever. And do hereby agree to accept the several benefits, payments and reserves promised to the Indians adhering to the said treaty at Carlton and Fort Pitt on the dates above mentioned; and further, do solemnly engage to abide by, carry out and fulfil all the stipulations, obligations and conditions contained on the part of the Indians therein named, to be observed and performed, and in all things to conform to the articles of the said treaty, as if the said Little Pine and Pap-a-way or the Lucky Man and the bands whom they represent had been originally contracting parties thereto, and had been present at the treaty at Carlton and Fort Pitt, and had there attached their signatures to the said treaty.[23]

Although Dewdney formally recognized Lucky Man as the leader of the 20 lodges referred to in the adhesion to Treaty 6 in 1879, Lucky Man and his followers remained closely aligned with Big Bear and Little Pine and continued to travel with them for several years.

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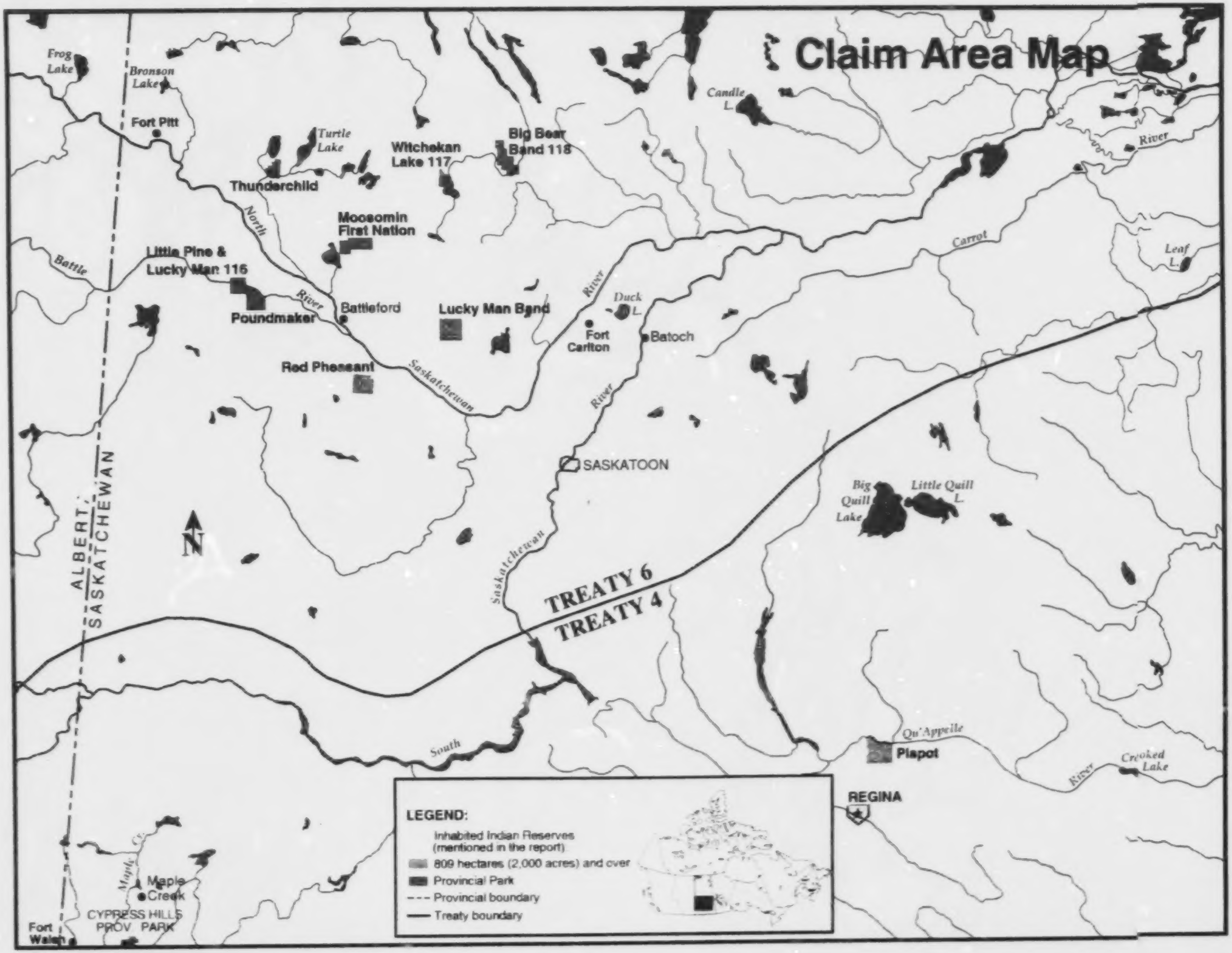
[23] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 366-67 (ICC Exhibit 1).

Claim Area Map



When annuity payments were distributed in September 1879 at Fort Walsh, 470 individuals were identified as belonging to the Lucky Man Band, including Lucky Man and four headmen.[24] Dewdney agreed to pay annuities to Little Pine and Lucky Man at Fort Walsh because he thought it would be onerous for the bands to travel to more northerly agencies when most of their hunting was confined to the south.[25] Fort Walsh and the Cypress Hills, however, lay within the boundaries of Treaty 4, well south of the limits of Treaty 6.

Lucky Man did not select reserve land directly after adhering to treaty. Instead, like many other bands, he and his people tried to continue subsisting by traditional means. The buffalo had all but disappeared by the end of the 1870s, however, and the Cree living in the Cypress Hills were constantly threatened with starvation. In his report for 1880, Dewdney reported: "The bulk of the Indians in the North-West Territories are to-day and have been for the last 12 months, almost entirely dependent on the Government for their existence."[26] Nevertheless, they continued to hunt, travelling ever farther in search of sustenance and using the provisions allocated under treaty as a means of subsidizing their traditional pursuit of the buffalo.

Despite the depletion of the buffalo herds and increasing pressure from American authorities to block Cree access to hunting grounds south of the border, the government continued to have difficulty inducing the traditional hunters to settle on reserves. Treaty 4 Indian Agent Edwin Allen commented in his annual report for 1880 that Lucky Man, Little Pine, and another Band, Piapot, had returned to Fort Walsh from hunting buffalo in the Missouri River district, but too late to receive the distribution of annuities in July that year. The Bands were weary from their search for buffalo, he wrote, "in a very destitute condition, almost without any clothing of any description."[27]

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[24] Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

[25] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 366.

[26] E. Dewdney, Indian Commissioner, to Superintendent-General of Indian Affairs, Ottawa, December 31, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1880."

The first discussions between Lucky Man and the government regarding reserve locations appear to have occurred in the fall of 1880. Allen met with the Chiefs of several bands at Fort Walsh to determine whether they intended to select and settle on reserves:

> I held several councils with the Indians who had not yet determined on a reservation with a view of ascertaining their opinion on the matter; there were several chiefs present, the principal being Pie-à-pot, Little Pine and Lucky Man. The first two of these chiefs expressed a wish of settling in this mountain, and *Lucky Man wished to locate in the neighbourhood of Battleford. I could get no definite answer from any of the chiefs as to when they would settle down. They were anxious to receive their annuity payments*. . . . I consulted Colonel Macleod, and he agreed with me in recommending the payment of those who had not arrived for the regular payment in July. The Indians . . . *came from the plains with the expectation of receiving their payments and purchasing clothing, &c., before returning again*, the camp numbered about 2,500 persons drawing rations.[28]

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[27] Edwin Allen, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1880" (ICC Documents, p. 26).

[28] Edwin Allen, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual

Arrangements were put into effect from October 1 to 6, 1880, to pay the bands that had missed the earlier annuity distributions. The Lucky Man paylist shows that 754 individuals were paid with the Band at Fort Walsh in 1880.[29]

Despite indicating that he wished to locate near Battleford within the boundaries of Treaty 6, Lucky Man continued during the ensuing year to pursue the buffalo in southern Saskatchewan and the United States, and showed no inclination to settle on a reserve. No reserve was set apart for the Band at that time. Commissioner Dewdney and many of his colleagues still maintained their belief that the ever-decreasing supply of buffalo would soon force the Cree onto reserves, as the government wished. In 1881, Dewdney instructed the new Indian Agency Inspector, T.P. Wadsworth, to attempt to convince the Treaty 6 Indians to move north:

> From Mr. Allen you will get a copy of the paylist of Indians paid last October at Fort Walsh. You will see from it that stragglers from no less than 43 different Bands were paid there. They must be told that they must join their own Chiefs and cannot be paid this year unless they accede to this request.
>
> There are three Bands, viz: "Little Pine," "Pie Pot" and "Lucky Man" who have not settled on their Reservations – although "Pie pot" agreed, I believe, to take one of Reservations surveyed at Crooked Lakes, and he should move there with his Band. "Little Pine" & "Lucky Man" when they joined the treaty, were anxious to be in Treaty 6. You will see the agreement in Mr. Morris' Book of Treaties made with the Indians – page 366. Last year they returned so late from the South and in such a wretched condition that it was thought advisable to pay them at Ft. Walsh but, at that time, they were told

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Report of the Department of Indian Affairs for the Year Ended 31st December, 1880" (ICC Documents, p. 26). Emphasis added.

[29] Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

> they must go North this year, and I hope you will be able to bring this about. These Indians are the wildest of our Plain Indians and have remained out as long as there was any chance of getting buffalo. I am of the opinion that this spring they will see that it is useless to depend any longer on that source of food supply and you should take the earliest opportunity of informing them of the urgent necessity there is for their settling down. If they agree to this proposition & you feel yourself satisfied that they are earnest - let me know at once in order that provisions might be made to meet their demand.
>
> I promised "Lucky Man" that if I came south this year, I would take him with me and let him see that those already settled were making a very good start and that the reports they heard from Halfbreeds and interested parties that Indians could not live on the assistance given them by the Government, was untrue. Inform him that I find it impossible to visit the South as I had expected during this Spring, but that if he is anxious to go North & see for himself, you will assist him. He could arrange for his Band to go to the Saskatchewan and you might take him with you and assist him to look out for a location. I would not object to his taking another of the Headmen of his Band with him.[30]

Still, the Cree remained resolute. Ultimately, 802 people were paid annuities with the Lucky Man Band at Fort Walsh in 1881.[31]

The Fort Walsh area remained a rendezvous point for the Cree. Lucky Man, Little Pine, and Big Bear set up camp for part of the year in the United States as they continued to hunt for buffalo. However, when the hunt was over, the Indians returned to Fort Walsh, as they had previously, to receive annuities and purchase provisions.

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[30] Edgar Dewdney, Indian Commissioner, to T.P. Wadsworth, Inspector of Indian Agencies, February 21, 1881, NA, RG 10, vol. 3726, file 27335 (ICC Documents, pp. 47-49).

[31] Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

Finally, the government and the North-West Mounted Police (NWMP) decided that Fort Walsh had to be closed to discourage this practice and to force the bands that had not yet chosen reserves to make their selections. The government had begun to view Fort Walsh as a centre where the traditional Indian way of life was subsidized by the Department of Indian Affairs. A report by Indian Agent Denny reflected the government position at the time:

> It will be a good thing should the Police and Indian Dept. leave this place altogether as early as possible next summer, before the big camp of mixed Crees, now across the line come back.
>
> The Indians will always make this a centre, as long as the Police and I[ndian] Dept. remain, and I can see that the only way to get them on to their reserves is for this place to be abandoned. . . .
>
> If all were not here, the Indians certainly would not come here, and if the Police and I[ndian] Dept. wait till the Indians go back to their reserves, they will remain here always. This big camp I speak of is comprised of Indians from all points some from Edmonton, there are about 200 lodges, the principle Chiefs being Little Pine, Little Poplar, Lucky Man and Big Bear. This camp is now across the line, but in case they run out of Buffalos or are driven back by the Americans will at once make for this place, but if this place were abandoned I think they would gradually break up and go back to where they belong.[32]

Denny reiterated his views in a subsequent letter to Dewdney:

> As long as there are a few Buffalo south and around these Hills and as long as the Police and Indian Department remain at this place this camp of Crees will remain away from their Reserves and come in here for their payments and when they run out of provisions for grub.

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[32] C.E. Denny, Indian Agent, to Hayter Reed, Assistant Indian Commissioner, December 6, 1881 (ICC Documents, pp. 67-68).

> They go across the line for Buffalo and whiskey and have easy times and then congregate and come to this place, which is within easy reach when they get a little hard up.
>
> This combination is a hard one to break up and can only be done in two ways. Either men enough should be stationed here to make them do what is required or else this point should be altogether abandoned and that as early as possible.[33]

The government was also concerned that the Cypress Hills offered limited agricultural potential. As early as 1880, Indian Agent Allen had noted the difficulties experienced by the Assiniboines in the area:

> I next visited the Assiniboine Reservation at the Head of Cypress Mountain. The reserve is situated in an excellent locality, for wood and water, but the climate is such that it is useless to think of continuing agriculture in that locality owing to the early frosts and snow storms which are so prevalent. . . . Although their crops were a failure they appear in no way discouraged, on the contrary, they speak of looking for a better location for their reserve next year.[34]

These sentiments were echoed by the NWMP Commissioner the following year in his recommendation that the government close Fort Walsh:

> In making this recommendation I am in a great measure prompted by the knowledge of the fact that the Indian Department do not consider

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[33] C.E. Denny, Indian Agent, to Edgar Dewdney, Indian Commissioner, December 14, 1881, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, p. 74).

[34] Edwin Allen, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1880" (ICC Documents, p. 26).

> that the farming operations at Maple Creek have been successful in the past, and that they are still less likely to prove so in the future.
>
> . . .
>
> It has been proved beyond a doubt that the Cypress Hills are not suited for agricultural purposes. The police force has been stationed here for six years, and yet there is not a *bona fide* settler within one hundred miles of Fort Walsh.[35]

Another aggravation for the Crown was the fact that Fort Walsh and the Cypress Hills were located within the Treaty 4 area. Dewdney and the government made it clear that they did not want to have Lucky Man, or any other band, selecting lands outside its own treaty area. Quite simply, the Department was not prepared to accommodate any Treaty 6 Indians who wished to locate their reserves in the Cypress Hills region.[36]

Although the Department desired the Cree to return north to the Treaty 6 area, the Cree were not easily persuaded to cooperate. In a report to the Minister of the Interior, NWMP Commissioner A.G. Irvine described his attempt to convince the Cree to move north:

> At the time of "Pie-a-pot's" departure from Fort Walsh [June 23, 1882], the Cree chief "Big Bear" (non-treaty Indian), "Lucky Man," and "Little Pine," with about 200 lodges, finding that I would not assist them in any way unless they went north, started from Fort Walsh to the plains in a southerly direction. These Chiefs informed me that

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[35] A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, February 1, 1882, Canada, Parliament, *Sessional Papers*, 1882, No. 18, "Annual Report of the Department of the Interior for the Year Ended 30th June, 1881," Part III, North-West Mounted Police Force (ICC Documents, p. 30).

[36] Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, May 11, 1882, NA, RG 10, vol. 3744, file 29056-2 (ICC Documents, p. 122).

> their intention was to take "a turn" on the plains in quest of Buffalo, and after their hunt to go north. They added that they did not intend crossing the international boundary line, - a statement which I considered questionable at the time.
>
> I, therefore, at the request of the officer commanding the United States troops at Fort Assinaboine, informed the American authorities of the departure of these Chiefs. The Americans in expressing their thanks were much gratified with the information imparted.[37]

Irvine went on to state that, with the departure of these Chiefs, "Fort Walsh was entirely rid of Indians."[38] His assessment was premature, however, and, with the coming of fall, he realized that the fort could not be closed as planned.

In the fall of 1882, the Cree again returned to Fort Walsh following the annual buffalo hunt. The hunt had not gone well that season. Some 2000 Indians representing various bands gathered at the fort, their condition apparently so poor that it was later described by the NWMP surgeon, Augustus Jukes, as a state of "extreme wretchedness."[39] Irvine himself thought their condition to be so dire that they could not make a journey north, even if they could be persuaded to do so.[40]

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[37] A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1883, Canada, Parliament, *Sessional Papers*, 1883, No. 23, "Annual Report of the Department of the Interior for the Year 1882," Part III, North-West Mounted Police Force (ICC Documents, p. 167).

[38] A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1883, Canada, Parliament, *Sessional Papers*, 1883, No. 23, "Annual Report of the Department of the Interior for the Year 1882," Part III, North-West Mounted Police Force (ICC Documents, p. 167).

[39] Dr Augustus Jukes, Surgeon, NWMP, to Frederick White, Controller, NWMP, October 17, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, p. 134).

[40] A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1883, Canada, Parliament, *Sessional Papers*, 1883, No. 23, "Annual Report of the Department of the Interior for the Year 1882," Part III, North-West Mounted Police Force

Nevertheless, he convened a general council with the Chiefs at Fort Walsh on September 17, 1882, to discuss the matter. Several Chiefs at the meeting indicated that they were prepared to select reserve sites, although some were still reluctant to move north:

> For some considerable time they made no demand for aid from the Government, but as the cold weather came on, being very poorly clad, and insufficiently supplied with food, they experienced much hardship from exposure and starvation. It was then that they requested me to transmit to you their message to the effect that "Pie-a-pot" wished to settle on the Reserve given him by Mr. Wadsworth last summer. "Little Pine" who is a relation of "Pie-a-pot's" to settle alongside of him, "Lucky man" and "Front man" wanted their reserves at Big Lake [located within the Treaty 4 boundaries] about thirty miles east of Fort Walsh. All wanted to receive their annuity money to enable them to make their winter Buffalo hunt. . . .[41]

It should be noted that Irvine had already threatened to withhold assistance if the Chiefs were not willing to indicate where they wished to settle.

It was obvious that, despite Dewdney's reluctance to let annuities again be paid at Fort Walsh, Irvine believed that no other option was viable, "inasmuch as I foresaw if no aid was accorded them, they would starve, and in a starving condition might have attempted to commit depredations."[42] Dewdney eventually

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(ICC Documents, p. 167).

[41] A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1883, Canada, Parliament, *Sessional Papers*, 1883, No. 23, "Annual Report of the Department of the Interior for the Year 1882," Part III, North-West Mounted Police Force (ICC Documents, p. 167).

[42] A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1883, Canada, Parliament, *Sessional Papers*, 1883, No. 23, "Annual Report of the

agreed to pay annuities at the fort. However, he made it plain that Irvine was to impress on the Indians that requests from the northern Cree for reserves in the Cypress Hills would not be entertained, nor would the Cree receive further assistance unless they moved north:

> You are aware that the Southern Country is not the country of the Crees and they should be told that it is no good their making a request to be given Reserves in the South.
>
> I hope you will impress upon the Indians that they have brought their helpless condition on themselves, that they have been warned that they would suffer if they remained South and the longer they continue to act against the wishes of the Govt the more wretched will they become. . . .[43]

The Department was forced to abandon its original plan to close the fort during the summer of 1882, although officials believed that the longer the outpost remained open, the more difficult it would be to entice the Indians northward. Treaty 4 Indian Agent Allan McDonald distributed annuity money that fall at Fort Walsh. The paylists for 1882 indicate that 872 Indians were paid with the Lucky Man Band.[44] Fort Walsh remained open through the winter of 1882-83 and additional provisions were distributed to prevent starvation among the Indians camped in the Cypress Hills.

Department of the Interior for the Year 1882," Part III, North-West Mounted Police Force (ICC Documents, p. 167).

[43] Edgar Dewdney, Indian Commissioner, to A.G. Irvine, Commissioner, NWMP, October 27, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 143-44).

[44] Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

On December 8, 1882, Chief Big Bear finally signed an adhesion to Treaty 6 at Fort Walsh. Dewdney at this time reasserted his intention to have the Cree move north to the areas set out in Treaty 6. In Dewdney's eyes, the situation at Fort Walsh was worsening. In his annual report to the Department, he wrote:

> The large sum expended last year in assisting Indians to remove to their reserves was, to a great extent, thrown away, the greater number of them having returned to Fort Walsh, where they had been accustomed to be fed without work, and where they had been bribed by the traders to remain and receive their payments.
>
> These Indians until lately made the Cypress Hills their point of rendezvous, and were a source of more or less anxiety, as, owing to their proximity to the International boundary line, they were constantly tempted to make incursions across the border into the camps of the United States Indians on horse-thieving expeditions; these, of course, being followed up by reprisals, which in the end, if not stopped, might have led to more serious complications of an international nature.
>
> I consequently decided to make another effort to disperse these bands and endeavor to get them to move to those sections of the Territories which they had formerly claimed as their own and had ceded under treaty to the Dominion.
>
> On being approached in this direction it was discovered that they were desirous of procuring fixed ammunition, of making one final horse-stealing expedition across the line in all the force at their command, return with as many scalps as possible, then after a certain delay acquiesce with our wishes. Their requests were refused, and on being told that every effort would be made on our behalf, as well as by the United States troops, to frustrate any such attempt, and to catch and punish the offenders, the idea, in the main, was abandoned. Repeated promises were then made on the part of the Indians, and as often broken by them, to leave Cypress Hills, until after two months constant talking and urging, the 2nd of July saw all but some 125

> lodges of recalcitrants with their backs towards the hills on the trails leading to their respective reserves.[45]

Lucky Man and some of his followers were among those who went north following the demolition of Fort Walsh in 1883, but they soon returned to the Cypress Hills. Upon arriving in Maple Creek, they were met by Dewdney's Assistant Commissioner, Hayter Reed, and told to return north. Lucky Man explained that he had only returned to gather up some of his members who had stayed behind. Dewdney, who later questioned the Chief's motives in his 1883 annual report, had instructed Reed to have Lucky Man and his people escorted northward, if necessary, by a detachment of the NWMP to ensure that they would not stray. Irvine reported on the NWMP's efforts in this regard:

> During the month of July, a strong escort was furnished to proceed with the Indians travelling from Maple Creek to Battleford, with a view of their settling upon their legitimate reserves. In the month of September it was found that notwithstanding the number of Indians who, at the request of the Indian Department, had proceeded to their reserves, we had still a very large camp remaining at Maple Creek, at which place they desired to remain for the winter. Knowing it to be the policy of the Government that these Indians should be removed from the proximity of the boundary, and located on their reserves north of the Canadian Pacific Railway line, and being fully aware how important it was that this judicious policy should be carried into effect, I was but too willing, at the request of [His] Honour the Lieutenant-Governor, to accompany the Acting Assistant Indian Commissioner to Maple Creek for the purpose of moving the Indians as desired.

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[45] Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, October 2, 1883, Canada, Parliament, *Sessional Papers*, 1884, No. 4, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883" (ICC Documents, p. 186).

> It affords me much pleasure to be able to report that the result of my mission was an eminently successful one. On mustering the Indians, I inform[ed] them that it was not the intention of the Government to allow them to remain at Maple Creek as they had no reserve there, and further that their loitering about the Canadian Pacific Railway line was contrary to their own interests. I explained to them the terms of the Vagrant Act recently extended to these Territories, stating to them that no body of men would be allowed to remain idly about the country, and that unless the wishes of the Government were acceded to, I should be forced to make arrests. In the case of "Lucky Man" who had returned from his reservation with the buck-boards and carts given him by the Indian Department, I explained to that Chief that these articles had been supplied with a view of enabling the Indians to follow agricultural pursuits on their reserves, and thus gain their own livelihood. I told "Lucky Man" that he had accepted the articles in question, and other aid from the Indian Department, upon these conditions, and that unless he promptly returned with his entire camp, to their reservation, he would be arrested.
>
> The Indians brought forward all manner of frivolous excuses in view of having their move delayed. These excuses I would not entertain for a moment. I told the Indians so in the plainest of language, and they proceeded northward the same day.[46]

Dewdney knew that the government policy of moving the Cree onto reserves meant that they would have to abandon their traditional ways, and he acknowledged that this decision was difficult for them to accept:

> It is a matter of no wonder that such a strong stand should have been made against our repeated efforts to cause them to leave their old haunts, places associated with thoughts of freedom and plenty, whilst

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[46] A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1884, Canada, Parliament, *Sessional Papers*, 1884, [No. 125], "Report of the Commissioner of the North-West Mounted Police Force, 1883" (ICC Documents, pp. 192-93).

> the buffalo roamed the Plains in countless numbers. Leaving these hills behind them dashed to the ground the last hope to which they had so strenuously and fondly clung, of once more being able to live by the chase.[47]

By November 1883 the Lucky Man and Little Pine Bands had camped near Battleford. The Department's year-end report included the following comments with regard to Little Pine's people:

> These Indians are at Battleford and not actually on the land selected by them, but are to move on to it so soon as the warm weather of the spring will permit.[48]

The Lucky Man Band was described in these terms:

> These Indians may be considered as virtually settled, as they are being kept working in neighbourhood of Battleford prior to moving to Reserve, being adjacent.[49]

The paylists indicate that, at the November 15, 1883, distribution of annuities at Battleford, 366 Indians were paid with the Lucky Man Band.[50]

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[47] Edgar Dewdney, Indian Commissioner to Superintendent General of Indian Affairs, October 2, 1883, Canada, Parliament, *Sessional Papers*, 1884, No. 4, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883" (ICC Documents, p. 186).

[48] Canada, Parliament, *Sessional Papers*, 1884, No. 4, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1883" (ICC Documents, p. 190).

[49] Canada, Parliament, *Sessional Papers*, 1884, No. 4, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1883" (ICC Documents, p. 190).

[50] Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

Settlement of the Lucky Man Band

In the spring of 1883, Dewdney informed Assistant Indian Commissioner E.T. Galt of his intention to number all reserves, surveyed or not, in Manitoba and the North-West Territories.[51] Reserves 116, 117, and 118 were assigned to Little Pine, Lucky Man, and Big Bear, respectively. However, since 1918, the number 117 has been used to denote the Witchekan Lake Indian Reserve, which was set aside that year for the Witchekan Lake Band.[52] Whether the number 117 was ever associated with an actual site on which Lucky Man *intended* to settle is unclear. In 1883, Lucky Man appears to have camped in the Battleford area although there is no precise description of his location. Similarly, there is no evidence before us that a Reserve 117 was ever *formally* set aside for the Lucky Man Band. Still, it is interesting to note that, later in the spring of 1883, Commissioner Dewdney purchased 10 yoke of oxen as required by Treaty 6 "to go North with the Indians, for 'Big Bear,' 'Little Pine' and 'Lucky Man.'"[53]

Throughout this period, tensions between the government and the Cree increased. The government believed that Big Bear was trying to establish the Cree on adjacent reserves so that they could be readily organized into a unified confederation.[54] The young nation of Canada feared this as a potential threat and instituted plans to maintain distance between proposed reserves sites. Hayter Reed wrote to the Superintendent General of Indian Affairs in April 1884 to inform him of the Commissioner's intentions concerning reserves:

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[51] Edgar Dewdney, Indian Commissioner, to E.T. Galt, Assistant to the Commissioner, March 5, 1883, NA, RG 10, vol. 3582, file 889 (ICC Documents, pp. 181-82).

[52] G.A. Poupore, Director, Lands and Membership, to Director of Operations, Saskatchewan Region, April 28, 1977 (ICC Documents, pp. 516-17).

[53] W. McGirr for Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, May 25, 1883, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, p. 184).

> The Agent was ordered to place [farming] instructors on Red Pheasant's, Poundmakers, Little Pines, Lucky Mans, Thunder Child and Big Bears Reserves–, but as the bands of Chiefs Little Pine, & Lucky Man have not fulfilled their promises by settling on Reserves, and working, I am under the belief none have been engaged for them. . . .
>
> If the Bands of Little Pine and Lucky Man should consent to settle on Reserves where the Commissioner considers it most desirable to place them, they will be well away from other Indians (viz at the Two Ponds about 30 miles above Poundmakers on the Battle River) consequently it would be advisable to have an Instructor, instead of an overseer for them, if not one for each band; and the latter course I respectfully submit would be found in the interests of the Department: owing to their numbers, (over 700 between the two bands). . . .[55]

Battleford District Indian Agent J.M. Rae advised Reed in April 1884 that "Little Pine's and Lucky Man's Bands started from here [Battleford] to go to *their Reserves* as per agreement."[56] The location of this "reserve" was later described by Rae as being "near Poundmaker's,"[57] but, by the end of spring in 1884, there was still no formal survey of a reserve for the Lucky Man Band.

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[54] Olive P. Dickason, *Canada's First Nations* (Toronto: McClelland and Stewart, 1992), 302.

[55] Hayter Reed, Assistant Indian Commissioner, to Superintendent General of Indian Affairs, April 14, 1884, NA, RG 10, vol. 3664, file 9843 (ICC Documents, pp. 206-07).

[56] J.M. Rae, Indian Agent, to Hayter Reed, Assistant Indian Commissioner, April 23, 1884, NA, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Documents, p. 209). Emphasis added.

Lucky Man and Little Pine stopped at Poundmaker's reserve en route from Battleford to "their Reserves." Poundmaker invited the Chiefs to be present when Chief Big Bear arrived for a council planned for later that spring.[58] Rae sent a proxy, Mr Gardner, to meet the Lucky Man and Little Pine Bands at Poundmaker's reserve. Gardner had instructions to persuade the two Chiefs to accept their treaty provisions and to move from Poundmaker's reserve to establish their own settlements. Gardner informed Lucky Man and Little Pine that, until they accepted their farming implements and cattle and started to work, they would receive no further rations.[59]

Rae reported that Gardner was unable to convince the Chiefs to accept the treaty provisions:

> Mr. Gardner whom I sent out with the Instructor tried to get the young men to take their implements and cattle (the latter I had to take from the other reserves as I did not want them to have as an excuse that they had nothing to work with). The Chiefs however prevailed on the young

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[57] J.M. Rae, Indian Agent, to Superintendent General of Indian Affairs, October 13, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year ended 31st December, 1884," 85 (ICC Documents, p. 236).

[58] J.M. Rae, Indian Agent, to Hayter Reed, Assistant Indian Commissioner, April 23, 1884, NA, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Documents, p. 209).

[59] J.M. Rae, Indian Agent, to Hayter Reed, Assistant Indian Commissioner, April 23, 1884, NA, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Documents, p. 209).

> men not to take them. Under the circumstances and acting on my order, Mr. Gardner stopped their rations.[60]

Eventually, some younger members of the two bands decided to break ranks with their Chiefs and start farming. They were joined shortly by Chief Little Pine himself. As Deputy Superintendent General of Indian Affairs, Lawrence Vankoughnet, noted when he drafted the year-end report:

> On the opposite side of Battle River [from the reserves of Thunder Child and Nepahase] are the reserves of Chiefs Pondmaker [sic] and Little Pine. The band of the latter chief only settled on their reserve last spring [i.e., spring 1884]. They however ploughed seventy acres, fenced fifty acres and planted thirty acres of land, besides cutting one hundred tons of hay, and erecting twelve houses, two stables, a store house and a building in which to keep their implements and tools.[61]

Nevertheless, the arrival of Big Bear at Poundmaker's reserve in May 1884 pre-empted the government's plans, at least temporarily. In his annual report to the Department in the fall of 1884, Rae recounted the events of the preceding spring:

> Most of Lucky Man's men joined Little Pine, who has always shown himself well inclined. In this respect, however, his head councillor, Mistutinwas, is the better of the two. They then began working, and did well, getting in thirty-four acres crop and fencing the same, also putting up a house and storehouse for the instructor. In May Big Bear

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[60] J.M. Rae, Indian Agent, to Hayter Reed, Assistant Indian Commissioner, April 23, 1884, NA, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Documents, p. 209).

[61] Superintendent General of Indian Affairs, to Governor General in Council, Annual Report, January 1, 1885, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884" (ICC Documents, p. 201).

> and his party came down from Pitt, and Lucky Man's people began to leave their work. Kamanitowas, the headman, however, said he wished to leave his chief and join Little Pine. There was not much trouble with those who now remained on the reserve, until a Thirst Dance was begun, when even Little Pine and his people left their work for a short time. . . .[62]

By early May 1884, Big Bear had informed government officials that he wished to have a reserve near Lucky Man and Little Pine, who had evidently camped near "Wolf Dung Hill, about 40 miles beyond Poundmakers."[63] The actual location of Wolf Dung Hill is not clearly described in the documentation but Big Bear's proposed site reportedly would have positioned him next to Poundmaker. The Department strongly resisted this proposition. Vankoughnet advised Dewdney in May 1884 that "Big Bear should not be allowed to take his Reserve near [Poundmaker's reserve close to] Battleford, his country being in the Fort Pitt district, and for other obvious reasons."[64] In a telegram to the Commissioner in June, Vankoughnet was more direct: "Fear more serious complications in future if Big Bear and Pound Maker have Reserves adjoining."[65]

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[62] J.M. Rae, Indian Agent, to Superintendent General of Indian Affairs, Annual Report, October 13, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884," 85 (ICC Documents, p. 236).

[63] J.M. Rae, Indian Agent, to Edgar Dewdney, Indian Commissioner, June 28, 1884, NA, RG 10, vol. 3576, file 309, pt B (ICC Documents, p. 215).

[64] Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, May 12, 1884, NA, RG 10, vol. 3576, file 309, pt B (ICC Documents, p. 212).

[65] Deputy Superintendent General of Indian Affairs to Edgar Dewdney, Indian Commissioner, June 27, 1884, NA, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Documents, p. 213).

Later that summer, Rae heard that Lucky Man, Poundmaker, and Big Bear were planning on taking up a reserve at Buffalo Lake near Hobbema, Alberta.[66] Rae consequently warned Poundmaker that he would not receive any assistance from the government if he was to abandon his existing reserve.[67] Shortly thereafter, Dewdney wired the following instructions to Rae:

> As Little Pine behaving his band to be well rationed. Lucky Man band to be fed if in any way acquiescing to your demands in this you to judge. Poundmaker will not be allowed another Reserve or take cattle.[68]

The warning did not sway Poundmaker or Lucky Man, and both departed with Big Bear for Buffalo Lake.[69]

Most members of the Little Pine Band chose not to follow Big Bear, however, and remained at their reserve. Dominion Land Surveyor John C. Nelson arrived in the Battleford area in July 1884 to survey reserves for bands desiring them, but Chief Little Pine "expressed a wish to have the survey of his Reserve postponed."[70] Nelson thus left without conducting a survey.

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[66] J.M. Rae, Indian Agent, to Edgar Dewdney, Indian Commissioner, June 29, 1884, NA, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Documents, p. 219).

[67] J.M. Rae, Indian Agent, to Edgar Dewdney, Indian Commissioner, June 29, 1884, NA, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Documents, p. 219).

[68] Edgar Dewdney, Indian Commissioner, to J.M. Rae, Indian Agent, July 5, 1884, NA, RG 10, vol. 3576, file 309, pt A (ICC Documents, p. 221).

[69] J.M. Rae, Indian Agent, to Edgar Dewdney, Indian Commissioner, June 30, 1884, NA, RG 10, vol. 3576, file 309, pt B (ICC Documents, p. 220).

[70] John C. Nelson, Dominion Land Surveyor, to Indian Commissioner, December 31, 1884, NA, RG 10, vol. 3703, file 17728 (ICC Documents, pp. 273-74).

Some members of the Lucky Man Band continued to travel with Big Bear and Lucky Man, while others apparently remained with Little Pine at this time. According to the October 20, 1884, paylist, only 82 Indians were paid with the Lucky Man Band at a "reserve," which was not specifically identified.[71] Lucky Man himself did not appear on the paylist for that year.[72]

Lucky Man continued his association with Big Bear and, in July 1884, they met with Louis Riel at Duck Lake.[73] There, a number of chiefs had gathered together with the Métis leader to prepare a summary of grievances for the Crown. Duck Lake was the opportunity Big Bear had been looking for. The old Chief vocalized his concerns about the need to revise the terms of treaty, as well as his reluctance to exchange his freedom for life on a reserve.[74]

Lucky Man apparently remained with Big Bear after the Duck Lake conference and throughout the following winter, and was paid annuities at Fort Pitt in the fall of 1884.[75] On Big Bear's 1884 paylist, Lucky Man was identified as an ex-Chief and paid as Band member 100.[76] Remarks on the paylist also indicate that several of the families with Big Bear had previously been paid as members of the

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[71] Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

[72] Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

[73] J.M. Rae, Indian Agent, to Edgar Dewdney, Indian Commissioner, July 29, 1884, NA, RG 10, vol. 3576, file 309, pt A (ICC Documents, p. 226).

[74] Hugh A. Dempsey, *Big Bear: The End of Freedom* (Vancouver: Greystone Books, 1984), 136-42.

[75] Big Bear Band Paylists, 1882-1884 (ICC Documents, pp. 290-91).

[76] Big Bear Band Paylists, 1882-1884 (ICC Documents, pp. 290-91).

Lucky Man or Little Pine Bands. Of the people travelling with Big Bear, Vankoughnet wrote:

> It is satisfactory to be able to report that the Indians who, as stated in my report of last year, were induced to remove north from the country bordering on the boundary line between Canada and the United States, have settled upon reserves, and are now making fair progress in farming – with the exception of Big Bear and his band, who delay their selection of a reserve, and who as they roam about the country and visit the reserves of other bands, endeavoring to instil disaffection among them, are a cause of considerable anxiety. Up to the present time, however, their efforts to induce the Cree Indians generally to increase their demands from the Government have been futile.[77]

In the same report, Inspector Wadsworth commented on meeting with the Indians at Fort Pitt:

> In passing through Fort Pitt I was interviewed by Big Bear, Lucky Man, Little Poplar, and their followers. I endeavored to convince them how much better off they would be if they chose a reserve and settled down.[78]

In the fall of 1884, Commissioner Dewdney grew increasingly concerned with the Cree Bands that had not yet selected reserves. His frustrations surfaced in a report to the Superintendent General:

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[77] Superintendent General of Indian Affairs to Governor General in Council, Annual Report, January 1, 1885, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884," x (ICC Documents, p. 197).

[78] T.P. Wadsworth, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, September 17, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884," 150 (ICC Documents, p. 203).

> *A few of the Indians that came from the South the year before last have not selected a reserve, notably those under Big Bear and Lucky Man.*
> . . .
>
> It has been recommended that Lucky Man be deposed from the temporary position of Chief, which he occupies. He is utterly worthless, and was paid as an ordinary Indian at the last payment.
>
> His followers have joined Big Bear.[79]

The table accompanying the Department's year-end report for 1884 indicates that neither Little Pine nor Lucky Man had selected reserves and had them surveyed and set apart for the benefit of their respective band members. Big Bear is shown as having a reserve in the Long Lake area, although the table also notes: "Reserve not definitely located."[80]

The 1885 Uprising and Its Aftermath

Big Bear had travelled from Duck Lake to Fort Pitt late in the summer of 1884. He informed department officials that he would settle on a reserve after receiving annuities but, once again, he failed to select a reserve. In November, Big Bear camped near Frog Lake, approximately 30 miles to the southeast of Fort Pitt, where he intended to wait out the winter. In the meantime, pressure from the Department to have the Chief select a reserve site mounted. Resentment also grew within his own ranks.

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[79] Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, November 25, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884," 158 (ICC Documents, p. 246). Emphasis added.

[80] Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1884" (ICC Documents, p. 281).

The Cree were close to their breaking point. The buffalo were gone, and the Department refused to provide them with provisions until they had selected reserves. Some of the younger Indians, including Little Bear, Big Bear's son, saw the old Chief as an impediment to progress and persisted in the belief that reserves would alleviate their suffering. They grew tired of Big Bear's resistance to change and their frustrations continued to mount in the early months of 1885.

The Indian sub-agent at Fort Pitt, Thomas Quinn, reported that little progress had been made over the winter in having Big Bear select a reserve site. Big Bear had continued with his strategy of delay in the hope that he would eventually win concessions from the government and revisions in the terms of treaty. In February 1885, however, Quinn managed to obtain a commitment from the Chief to select a reserve in the spring,[81] but the Department was not satisfied with this vague promise. Another Indian Affairs official, Métis interpreter Peter Ballendine, was sent to Fort Pitt early in March to persuade Big Bear to select a definite reserve site. After daily meetings with Ballendine, Big Bear finally indicated that he would choose a reserve at the mouth of "Dog Rump Creek," 30 miles from Frog Lake.[82]

Big Bear was not quite through yet, however. After the Ballendine meetings, he stipulated that he would not leave Frog Lake until he had first met with either Commissioner Dewdney or Assistant Commissioner Reed. Big Bear was perhaps hoping for one more audience with the Crown to voice his concerns. Nevertheless, by March, events beyond the Chief's control had begun to unfold. On March 3,

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[81] Thomas Quinn, Indian Sub-Agent, to Edgar Dewdney, Indian Commissioner, February 25, 1885, NA, RG 10, vol. 3580, file 730 (ICC Documents, pp. 310-12).

[82] Thomas Quinn, Indian Sub-Agent, to Edgar Dewdney, Indian Commissioner, March 13, 1885, NA, RG 10, vol. 3580, file 730 (ICC Documents, pp. 319-22).

1885, Louis Riel declared his own provisional government in the territories. Two weeks later, on March 18, the North-West Rebellion began after Riel took prisoners and seized stores at Batoche.[83]

Following the outbreak of the Riel insurrection, word quickly spread to the Frog Lake settlement. The frustrations of the younger chiefs finally found a vent and, with news of the Métis hostilities, violence exploded at the small village. A group of Indians killed several white inhabitants, including Quinn and two clergymen, on April 2, 1885. Although the reasons for these killings were undoubtedly linked in some ways to the Riel revolt, they were more directly related to factors affecting the Cree alone. In any case, the slayings were carried out by younger Indians.[84] It appears that Big Bear tried to stop the violence, realizing that any chance of negotiating or holding out for a better deal with the government would end with the deaths of the white men. The army and police sent to put down Riel would eventually travel to confront the Cree.

The evidence before the Commission does not suggest that Lucky Man participated in any of the killings that day at Frog Lake, but he was clearly there when they took place. The armed response anticipated by Big Bear was not long in coming. Relentlessly pursued after Frog Lake and an ensuing battle at Fort Pitt, the Cree were inevitably defeated by the greater numbers of the military and the police. Lucky Man and Little Bear fled to the United States in late June after the uprising.[85]

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[83] Hugh A. Dempsey, *Big Bear: The End of Freedom* (Vancouver: Greystone Books, 1984), 136-42.

[84] Hugh A. Dempsey, *Big Bear: The End of Freedom* (Vancouver: Greystone Books, 1984), 136-42.

[85] Hugh A. Dempsey, *Big Bear: The End of Freedom* (Vancouver: Greystone Books, 1984), 179-80.

On August 21, 1885, Commissioner Dewdney wrote to the Superintendent General of Indian Affairs to identify the bands considered to be either loyal or disloyal during the 1885 rebellion. Even that portion of the Lucky Man Band that had remained at the Little Pine reserve - seven men, four women and 58 children - was considered disloyal. Both Lucky Man and Big Bear were later identified by Indian Affairs as having participated in the 1885 rebellion:

> With the exception of Big Bear's band these Indians were disposed to be loyal. However, Big Bear (and Lucky Man who was there from Battleford) carried most of the older Indians with them. They were followed by the scum of the Indians, & had long resisted entering Treaty & after doing so had been a constant source of trouble, as they had been before in the U[nited] States. . . .[86]

In the wake of the rebellion, the Department set about instituting policies designed to ensure that another revolt could not occur:

- Annuity payments were temporarily withheld from bands considered to have been disloyal to the Crown.[87]

- The tribal system in the North-West Territories was "broken up as much as possible, so that each individual Indian may be dealt with instead of through the Chiefs."[88] One method of "striking at the heart of the tribal system and that of community of lands" was to subdivide reserves into individual farms, which was expected "to foster self-reliance, to increase a spirit of emulation in their labors, and hasten the attainment of independence . . . [and] the sense of personal proprietorship and responsibility."[89]

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[86] Indian Affairs, "Memo re Indians who took part in Rebellion of 1885," March 19, 1894, NA, RG 10, vol. 3710, file 19550-4 (ICC Documents, p. 435).

[87] Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, October 28, 1885, NA, RG 10, vol. 3584, file 1130, pt 1B (ICC Documents, p. 342).

[88] Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, October 28, 1885, NA, RG 10, vol. 3584, file 1130, pt 1B (ICC Documents, p. 341).

- Efforts were made to disarm all Indians, "not by compulsion but by persuasion and by keeping ammunition from them."[90]

- The pass system was instituted "to prevent . . . Indians who were involved in the rebellion from leaving the Reserves without passes signed by an official of the Department," but was also to be "introduced as far as practicable in the loyal Bands as well."[91]

- Horses belonging to rebel Indians were to be confiscated and sold, with the proceeds to be applied to the purchase of cattle and other necessities for the bands.[92]

- Since the Department considered that Big Bear's Band "would doubtless continue to be a source of trouble . . . which will be greatly minimized if they are scattered amongst a number of Bands," the Band was dismantled and its members redistributed.[93]

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[89] Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, November 17, 1886, Canada, Parliament, *Sessional Papers*, 1887, No. 6, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886," 108-09 (ICC Documents, p. 365).

[90] Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, October 28, 1885, NA, RG 10, vol. 3584, file 1130, pt 1B (ICC Documents, p. 343).

[91] Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, October 28, 1885, NA, RG 10, vol. 3584, file 1130, pt 1B (ICC Documents, pp. 343-46).

[92] Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, October 28, 1885, NA, RG 10, vol. 3584, file 1130, pt 1B (ICC Documents, p. 352).

[93] Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, October 28, 1885, NA, RG 10, vol. 3584, file 1130,

For the time being, Lucky Man, too, was gone and no longer a concern of the Department. As for those who remained behind, Indian Agent J.A. MacKay reported that Little Pine's reserve "is the most recently settled of any in this agency, and the bands that occupy it (Little Pine's and Lucky Man's) have been very much broken up by the rebellion."[94]

Eventually, after 11 years of "exile" in the United States, Lucky Man was returned to Canada in 1896 by American authorities. When he crossed the border, Lucky Man was arrested for participating in the Frog Lake massacre but was released in July 1896 when he could not be directly linked to any of the killings.[95] After his release, Lucky Man set out for the Hobbema Agency by train to link up with some of his party who were awaiting him there. His whereabouts after that departure are difficult to track, although evidence suggests that he died in Montana in 1899.

Indian Reserve 116

We have no evidence that the Lucky Man Band was ever given a reserve designated for its members only before 1989. However, some members of the Band lived on IR 116 after it was surveyed in 1887. In the Department's 1887 Annual Report,

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pt 1B (ICC Documents, p. 347).

[94] J.A. MacKay, Indian Agent, Battleford, to Superintendent General of Indian Affairs, Annual Report, August 13, 1886, Canada, Parliament, *Sessional Papers*, 1887, No. 6, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886," 127 (ICC Documents, p. 362).

[95] A.B. Perry, Superintendent, NWMP, Annual Report, December 22, 1896, Canada, Parliament, *Sessional Papers*, 1897, No. 15, "Report of the Commissioners of the North-West Mounted Police Force, 1896," App. B (ICC Documents, p. 461).

Deputy Superintendent General Vankoughnet described the reserve arrangement between the Lucky Man and Little Pine Bands in these terms:

> The Battleford Agency embraces at present the reserves and bands of Moosomin, Thunder Child (with the subsidiary bands of Nipahays and young Chipewayan living on the same reserve), Little Pine (with the subsidiary band of Lucky-man on the same reserve), Poundmaker, Sweet Grass, Red Pheasant, Mosquito (with the subsidiary bands of Bear's Head and Lean Man on the same reserve).[96]

Dominion Land Surveyor John C. Nelson, who had been sent away by Little Pine in 1884, returned to supervise the survey of IR 116 in 1887. In his report to the Superintendent General, Nelson stated:

> On our return to camp, Mr. Gopsil [the local farming instructor] and I examined the lands upon which the bands of "Little Pine" and "Lucky Man" have settled, and I decided to make the reserve five miles square as shown by the accompanying plan, marked (*d*), and proceeded with the survey.
>
> The reserve contains twenty-five sections and a small gore adjoining the west boundary of Poundmaker's Reserve. The townships in which it lies are sub divided. It is situated on Battle River, thirty-five miles west of Battleford. The location is remarkably beautiful and the soil is very much better than that on the reserve of Poundmaker which bounds it on the east side. There are hay meadows, rich soil, plenty of good water, a variety of wild berries, fishing grounds, and

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[96] Superintendent General of Indian Affairs to Governor General, Annual Report, 1887, Canada, Parliament, *Sessional Papers*, 1888, No. 15, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1887" (ICC Documents, p. 370).

> on the north side of Battle River an abundance of timber; on the north side, however, the soil is generally light and sandy.[97]

The survey plan for IR 116 is dated September 1887, and both it and the accompanying description state that the reserve was surveyed "For the Bands of Chiefs 'Little Pine' and 'Lucky Man.'"[98] Neither of the old Chiefs was present during the survey, however, since Little Pine had died in 1885 and Lucky Man was still in the United States. The reserve comprised 25 square miles, more or less, and was confirmed by Order in Council PC 1151 on May 17, 1889.[99] The 1887 paylist showed the population of the Lucky Man Band paid at the "Little Pine Reservation" as 62.[100]

There are no indications in any of the documents following the 1885 uprising that the Lucky Man Band ever requested a reserve of its own. In the ensuing years, Band members participated in the farming activities on IR 116. In correspondence dated April 28, 1892, however, Hayter Reed, newly appointed as Indian Commissioner, provided a summary of provisions distributed to bands in the

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[97] John C. Nelson, D.L.S., in charge Indian Reserve Surveys, to Superintendent General of Indian Affairs, December 30, 1887, Canada, Parliament, *Sessional Papers*, 1888, No. 15, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1887" (ICC Documents, pp. 374-75). The township subdivision referred to by Nelson had been performed by Dominion Land Surveyor C.F. Leclerc in 1884, and the copies of Leclerc's plans in evidence before the Commission contain handwritten notations indicating the location of "Little Pine's Reserve." It seems clear, however, that these notations were endorsed on the plans in 1887 or later since they state that the reserve was "surveyed" in 1887.

[98] Order in Council PC 1151, May 17, 1889 (ICC Documents, pp. 410-12).

[99] Order in Council PC 1151, May 17, 1889 (ICC Documents, pp. 410-12).

[100] Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

Battleford Agency under the terms of Treaty 6. The Little Pine Band was listed as receiving one horse, eight oxen, one bull and 12 cows,[101] but no separate mention was made of the Lucky Man Band. Nevertheless, from time to time in correspondence and official records, IR 116 was variously referred to as the "Little Pine and Lucky Man Indian Reserve" or the "Little Pine Indian Reserve," but never as the "Lucky Man Indian Reserve."

The Little Pine and Lucky Man Bands shared a common trust account until the fiscal year ending in 1979, and it is only since 1980 that the Lucky Man Band has held a separate trust account. Lucky Man has had its own separate treaty annuity paylists continuously since 1879, however.

The 1989 Settlement Agreement

On April 26, 1974, the members of the Lucky Man Band assembled at the home of member Simon Okemow on IR 116 to consider the election of the Band's first Chief since Lucky Man himself had left to join Big Bear in 1884. They decided to hold an election on May 7, 1974, with the new Chief and councillors to be elected by "the custom of the Band." One of the major concerns expressed at the meeting was that the Band did not have its own reserve, and "[i]t was agreed by the Band that we approach the Federation [of Saskatchewan Indians] to assist the Band in getting a separate reserve."[102]

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[101] Hayter Reed, Indian Commissioner, to Deputy Superintendent General, April 28, 1892, NA, RG 10, vol. 3876, file 73870 (ICC Documents, pp. 426-31).

[102] Minutes of meeting of the members of the Lucky Man Band, April 26, 1974, Submissions on Behalf of the Government of Canada, November 19, 1996, Exhibit 10.

The minutes of this meeting were forwarded to H.L. Hansen, Supervisor for the North Battleford District, who acknowledged in reply that he had not yet received any response from his Regional Director "as to whether there was any historic reason why Lucky Man Band do not have their own Council and if there is anything to prevent them now from electing their own Band Council."[103] The Band subsequently passed a Band Council Resolution dated June 7, 1974, requesting that the Department "recognize our Election by Band Custom, effective May 23, 1974."[104] There is no evidence before the Commission to suggest that it was improper for the Band to elect its own Chief and councillors, and subsequent events indicate that Canada was prepared to accept the results of the election and recognize the newly elected Council.

Later that year, the Lucky Man and Little Pine Bands submitted a claim development proposal to Canada to obtain financial assistance to research and develop their treaty land entitlement claims. By the late 1970s, research disclosed that, together, the two bands did not receive all of the land to which they were entitled under Treaty 6. In 1980, the Lucky Man Band submitted a treaty land entitlement proposal to Canada, and, nine years later, the Band and Canada entered into the Settlement Agreement of November 23, 1989.[105]

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[103] H.L. Hansen, District Supervisor, North Battleford District, to Rod King, Federation of Saskatchewan Indians, April 29, 1974, Submissions on Behalf of the Government of Canada, November 19, 1996, Exhibit 10.

[104] Band Council Resolution 1974-75/2, June 7, 1974, Submissions on Behalf of the Government of Canada, November 19, 1996, Exhibit 10.

[105] Submissions on Behalf of the Government of Canada, November 19, 1996, pp. 6-7.

Under the terms of the Settlement Agreement, Canada agreed to set apart the 7680 acres of land described in Part I of this report as reserve for the use and benefit of the Band. As part of the Settlement Agreement, the Band provided Canada with an absolute surrender of:

> all the Lucky Man Band's right, title, interest and benefit which the Band, the members of the Lucky Man Band of Indians, for themselves and each of their respective heirs, successors, descendants and permitted assigns, may have (if any) in and to Reserve No. 116 established by Order in Council P.C. 1151 dated the 17th of May, 1889, the description of which Reserve is as follows:
>
>> The whole of Little Pine and Lucky Man Indian Reserve No. 116 as shown on a Plan of Survey No. 284 of record in the Canada Lands Survey Records at Ottawa.[106]

The Settlement Agreement and surrender were later approved by a referendum of Band members. A separate Settlement Agreement was entered into with the Little Pine Band in 1993.[107]

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[106] Schedule "A" to the Notice of Referendum, The Lucky Man Band of Indians, Document of Surrender, July 15, 1989, Submissions on Behalf of the Government of Canada, November 19, 1996, Exhibit 2.

[107] Submissions on Behalf of the Government of Canada, November 19, 1996, p. 7.

PART III

ISSUES

The parties to this inquiry are agreed that the only question to be determined by the Commission is the appropriate date for calculating the Lucky Man Cree Nation's population for treaty land entitlement purposes. Counsel for Canada was quite specific in noting that "[t]he Commission is not being asked to make findings with respect to the issue of the Band's population at any given date."[108] That is an evidentiary issue which, depending on the Commission's recommendations arising out of this inquiry, the parties will attempt to resolve themselves through further research and paylist analysis.

The question of the appropriate date for calculating treaty land entitlement requires the Commission to consider a couple of subsidiary issues, however. First, Canada invited us to conclude that the effects of the 1989 Settlement Agreement are twofold: (a) it precludes Lucky Man from claiming to be entitled to any additional treaty land, and (b) it represents a final agreement between the parties that the First Nation's population of 60 in 1980 should be the operative treaty land entitlement population. The First Nation disagrees with this characterization of the Settlement Agreement. We will therefore consider, as a preliminary matter, whether the Settlement Agreement imposes the sorts of restrictions suggested by Canada.

Second, in the event that the Settlement Agreement is not determinative of the entire inquiry, it will become necessary for us to review the terms of Treaty 6 to identify the principles for calculating a band's treaty land entitlement population. We have already undertaken a similar process in our recent report dealing with the treaty land entitlement claim of the Kahkewistahaw First Nation under Treaty 4, and we will consider whether the principles identified in that case also apply to Treaty 6 and to the treaty land entitlement claim of the Lucky Man Cree Nation.

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[108] Submissions on Behalf of the Government of Canada, November 19, 1996, p. 1.

Finally, we will turn to the broad issue of determining which of the alternative historical dates for calculating treaty land entitlement is most appropriate in the circumstances of this case.

PART IV

ANALYSIS

ISSUE 1 THE 1989 SETTLEMENT AGREEMENT

Terms of the Settlement Agreement

It is Canada's position in this inquiry that the Settlement Agreement of November 23, 1989, between Canada and the Lucky Man Cree Nation disposes of the First Nation's treaty land entitlement claim. Canada put forward two bases for this position. First, Canada contended that the terms of the Settlement Agreement, when considered in the context of the negotiations leading up to that agreement, preclude Lucky Man from claiming any further entitlement to land under Treaty 6. Second, if the Commission should decide that the Settlement Agreement does not prohibit the First Nation from claiming further treaty land entitlement, Canada submitted that the parties nevertheless contracted under the Settlement Agreement that the First Nation's 1980 population of 60 should form the basis of its treaty land entitlement. This second argument is predicated on the assumption that the Lucky Man Band ceased to exist in the aftermath of the 1885 rebellion and was not reconstituted until the mid-1970s.

In response, Lucky Man submitted that it is inappropriate for Canada to go behind the terms of the Settlement Agreement when those terms, in the First Nation's view, clearly provide that the First Nation is entitled to bring forward a claim of this precise nature. The First Nation also rejected Canada's suggestion that it had ceased to exist for the century preceding its reconstitution in 1974.

The relevant provisions of the Settlement Agreement are paragraphs 3, 10, and 11:

3. RELEASE

(A) In consideration of this Treaty Land Entitlement Settlement Agreement and in particular the covenants and agreements contained herein and subject to the provisions of paragraph (B), the Band does hereby:

i) cede, release and surrender to Canada all claims, rights, title, interests and benefits the Band ever had, now has or may hereafter have by reason of or in any way arising out of land quantum pursuant to Treaty No. 6, up to 7,680 acres, more or less, as such lands are more particularly described in Schedule "1" annexed hereto; and

ii) release and forever discharge Canada, Her servants, agents and successors from all obligations imposed on, and from all promises and undertakings made by Canada under Treaty No. 6 relating to land entitlement of up to 7,680 acres, more or less, and does hereby waive any rights, actions or causes of action, claims or demands of whatever nature or kind which the Band ever had, now has or may hereafter have against Canada by reason of or in any way arising out of Treaty No. 6 relating to land entitlement of up to 7,680 acres, more or less, it being further understood by the parties hereto that this agreement, and in particular the covenants contained herein, represent full and final satisfaction of all obligations or undertakings of Canada relating to land entitlement of up to 7,680 acres, more or less, contained in Treaty No. 6; and is in full satisfaction of all manner of costs, legal fees, travel and other expenses expended by the Band or its representatives for the purpose of arriving to and entering into this Settlement Agreement;

(B) The Release referred to in paragraph (A) herein is given without prejudice to and without it being construed in any way as a forfeiture or waiver by the Band, its members or each or any of

> them, to any claim the Band, its members or each or any of them may have:
>
> a) to compensation for allegedly being denied the privileges of the full use and benefit of Reserve lands to which the Band had Treaty Entitlement,
>
> b) to compensation in lieu of land should it be determined at some future date that the Band had a greater Treaty Land Entitlement than the quantum of the land set aside as the Band's Reserve as such lands are more particularly described in Schedule "A" hereto. . . .
>
> 10. ENTIRE AGREEMENT
>
> a) All of the schedules attached hereto form part of this Settlement Agreement.
>
> b) This Settlement Agreement shall be the entire agreement and there is no representation, warranty, collateral agreement or condition affecting this Settlement Agreement except as expressed within it.
>
> 11. PRESUMPTIONS
>
> There shall not be any presumption that doubtful expressions in this Settlement Agreement be resolved in favour of either party.[109]

Effect of Release Provisions

Canada relied on correspondence between the parties in the years preceding the Settlement Agreement to support its argument that the agreement precludes the

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[109] Treaty Land Entitlement Settlement Agreement, dated November 23, 1989, between Her Majesty the Queen in right of Canada, as represented by the Minister of Indian Affairs and Northern Development, and the Lucky Man Band of Indians (ICC Exhibit 4).

Lucky Man Cree Nation from claiming additional treaty land entitlement. Canada also argued that the minutes of Chief Rod King's October 22, 1980, treaty land entitlement proposal to Canada further support that position. In Canada's view, considering the Settlement Agreement in the context of these documents leads to the following conclusions:

- The parties intended to treat the First Nation's treaty land entitlement claim as mutually exclusive of its claim for loss of use of reserve lands from 1882 until the current reserve was set aside in 1989. Canada argued that the First Nation's attempt to establish its present claim on a treaty land entitlement basis is entirely inconsistent with the First Nation's position throughout the negotiation of the Settlement Agreement.[110]

- The parties intended to fully resolve Lucky Man's treaty land entitlement claim by means of the Settlement Agreement.[111]

- The Settlement Agreement was based on a professional evaluation by the First Nation's own experts of Lucky Man's existing and future socio-economic needs. As such, it satisfied one of the major objectives of Treaty 6, which was to provide bands with an adequate land base. Canada contended that, by providing the agreed land, it fully discharged its obligation to provide treaty land to the First Nation.[112]

- The Settlement Agreement was based on the First Nation's agreed population of 60 in 1980, representing the First Nation's highest population since the mid-1880s. Canada contended that the settlement was therefore based on the "current population formula" for calculating treaty land entitlement, and as a result was even more generous than the Saskatchewan formula, which was based on band populations as of December 31, 1976.[113]

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[110] ICC Transcript, December 3, 1996, pp. 97-101 (Richard Wex).

[111] ICC Transcript, December 3, 1996, pp. 113-16 (Richard Wex).

[112] ICC Transcript, December 3, 1996, pp. 101-03 (Richard Wex).

- The release in the Settlement Agreement was intended to apply only if the courts had articulated a principle of law, or if Canada had adopted a new approach to determining treaty land entitlement, such that Lucky Man would receive a better deal in such circumstances than it received under the Settlement Agreement. Canada argued that subparagraph 3(B) was specifically *not* intended to permit the First Nation to advance a further treaty land entitlement claim under circumstances other than those just described. Canada also contended that those qualifying circumstances had not arisen. In a legal sense, no court has ever held that the appropriate date for determining a band's population for treaty land entitlement purposes is the date of treaty adhesion (nor has the Indian Claims Commission, for that matter) and, as a matter of policy, Canada has never taken the position that it has a lawful obligation to set aside land for a band on the basis of its population at the date of treaty adhesion.[114]

We do not agree with Canada. Although counsel for Lucky Man submitted that the short answer to Canada's position on this issue is that it runs afoul of the parol evidence rule, the Commission does not consider it necessary to base its decision on a technical application of that rule. We conclude that the Settlement Agreement on its face does not say what Canada claims it does.

We interpret the Settlement Agreement to mean that, in exchange for Lucky Man giving up all rights to IR 116, Canada provided the First Nation with the 1989 reserve containing 7680 acres, or sufficient land for 60 people – the First Nation's population in 1980. At the same time, in subparagraph 3(A) the First Nation released Canada from any further obligation to provide land or to reimburse the

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[113] ICC Transcript, December 3, 1996, pp. 96-97 (Richard Wex).

[114] ICC Transcript, December 3, 1996, pp. 104-12 (Richard Wex).

First Nation for any additional costs associated with negotiating the Settlement Agreement. The Settlement Agreement clearly does *not* preclude the First Nation from seeking compensation *in lieu of* additional treaty land should it eventually be determined that the First Nation's treaty land entitlement should be based on a population of *more* than 60 people. Nor does the agreement prevent the First Nation from claiming compensation for loss of use.

Clause 3(B)(b) states in clear and unambiguous terms that the release in subparagraph 3(A) is given without prejudice to the First Nation's right to compensation in lieu of land "should it be determined at some future date that the Band had a greater Treaty Land Entitlement than the quantum of the land set aside as the Band's Reserve" under the Settlement Agreement. The words "should it be determined at some future date" are not limited in any way, and we conclude that it is open not only to the courts but also to this Commission to make such a determination if that conclusion is justified on the evidence. To suggest that only a court of law can make this determination would be contrary to one of the main objectives of the Specific Claims Policy since it would require the First Nation to resort to litigation to resolve the issue.

We consider the intentions of the parties as expressed in the correspondence preceding the Settlement Agreement to be irrelevant. The process of negotiation is one in which the positions of the parties may change many times, with the result that the intention underlying the eventual agreement may bear little resemblance to the position taken by one of the parties at an earlier point in time.

Counsel for Lucky Man also argued that, although the courts have been willing to consider evidence of negotiations preceding the treaties,[115] they are much more reluctant to do so in the context of modern agreements where the parties have been represented by counsel.[116] It is a principle of treaty interpretation that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian,"[117] but in this case the parties have agreed in paragraph 11 of the Settlement Agreement that this presumption shall not apply in its interpretation. Similarly, subparagraph 10(b) provides that the Settlement Agreement is the entire agreement between the parties, and that no representation, warranty, collateral agreement, or condition shall be found to affect the Settlement Agreement unless contained expressly within it. In our view, these terms make it clear that it is not open to the Commission to consider interpretations which, in Canada's submission, are suggested by the correspondence preceding the Settlement Agreement.

Treaty Land Entitlement Population of Reconstituted Band

Before embarking on a review of the principles for identifying the most appropriate date for determining a band's treaty land entitlement, we must consider Canada's further preliminary argument that the parties contracted under the Settlement Agreement to use the First Nation's 1980 population of 60 as the basis of its treaty land entitlement. This argument is based on two assumptions. The first assumption is that the Lucky Man Band ceased to exist following the 1885 rebellion, and that its claim arose only after the First Nation was recently "reconstituted" as a separate legal entity. Until the First Nation had been reconstituted, Canada contended that it was under no obligation to set aside a separate reserve in the intervening years when the First Nation did not exist.[118]

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[115] *R. v. Sioui*, [1990] 3 CNLR 127 at 150 (SCC).

[116] ICC Transcript, December 3, 1996, pp. 49-51 (Thomas Berger), relying on *Eastmain v. Robinson*, [1993] 1 FC 501 at 515-16, 99 DLR (4th) 16, Decary JA.

[117] *Nowegijick v. The Queen*, [1983] 1 SCR 29, 46 NR 41, [1983] 2 CNLR 89 at 94, [1983] CTC 20.

The second assumption is that the parties in fact agreed in the Settlement Agreement to resolve fully Lucky Man's treaty land entitlement claim on the basis of the First Nation's population of 60 as of October 22, 1980. Canada acknowledged that, in most cases, the appropriate date for determining treaty land entitlement is the date of first survey. However, Canada argued that date-of-first-survey analysis does *not* apply where the treaty stipulates the area or boundaries of a band's reserve, or where Canada and a band have otherwise agreed on the boundaries of the band's reserve or the band's population for treaty land entitlement purposes.[119] In this case, Canada contended that it is unnecessary to determine Lucky Man's date-of-first-survey population because the parties, by the terms of the 1989 Settlement Agreement, agreed on a population count to be used for treaty land entitlement purposes.

We have already dealt with the latter of these assumptions. With all due respect to counsel for Canada, we do not see in the terms of the Settlement Agreement any agreement of the parties, express or otherwise, that the First Nation's treaty land entitlement population should be limited to 60. Indeed, the terms of the exception to the release in subparagraph 3(B)(b) make it clear that the parties intended to leave it open to the First Nation to bring a claim for compensation in lieu of additional treaty land entitlement over and above the 7680 acres provided under the agreement.

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[118] ICC Transcript, December 3, 1996, p. 234 (Richard Wex).

[119] ICC Transcript, December 3, 1996, pp. 222-23 (Richard Wex).

With regard to the assumption that the Band ceased to exist shortly after 1885, Canada argued that Lucky Man had not been a chief prior to the Band's adhesion to Treaty 6 in 1879, but had merely led a faction of Big Bear's Band into treaty in order to be able to collect annuities. After adhesion, Band members continued to travel with Big Bear until some settled with Little Pine in 1884. The remainder stayed with Big Bear until they were dispersed in the wake of the 1885 rebellion. Counsel submitted that Lucky Man was deposed as Chief after 1883, and that no new Chief was chosen until 1974. In support of its contention that the Band ceased to have a separate existence shortly after the rebellion, Canada pointed to the fact that no separate trust accounts were maintained for the Band until after it was reconstituted in 1974. Moreover, Canada argued that no separate references were made to the Band in the Annual Reports of the Department after 1888.[120]

We agree with the Lucky Man Cree Nation, however, that it has continued to exist without interruption since it adhered to Treaty 6 in 1879. As counsel for the First Nation submitted, the Department's Annual Report for 1886 referred to *both* the Lucky Man and Little Pine Bands as being settled on IR 116, and surveyor John C. Nelson's 1887 survey plan also expressly states that the reserve was surveyed for *both* bands. This was confirmed in Order in Council PC 1151 dated May 17, 1889, and separate band paylists have been maintained for the two Bands in every year since 1879.[121] Canada's own records appear to counter its arguments, and we tend to agree with the First Nation that the fact that it did not appear in the Annual Reports after 1888 demonstrates more that the Band ceased to be an administrative concern for the Department than that the Band ceased to exist altogether. We also concur with the First Nation's argument that Lucky Man's status as an ordinary member of Big Bear's Band commencing in 1884 merely meant that he ceased to be Chief of the Lucky Man Band, not that the Band ceased to exist. In short, we see nothing in the Settlement Agreement or in the other factual evidence before us to suggest that First Nation's existence should not be considered to have been ongoing at all relevant times.

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[120] ICC Transcript, December 3, 1996, pp. 224-31 (Richard Wex).

We will now consider Treaty 6 and the fundamental principles in identifying the date for calculating treaty land entitlement.

ISSUE 2 DATE FOR CALCULATING LAND ENTITLEMENT UNDER TREATY 6

It will be recalled that the Lucky Man Cree Nation has proposed three alternative dates for calculating its treaty land entitlement - 1880, 1882, and 1883 - while Canada has, in reply, submitted two dates - 1887 and 1980. We have already rejected Canada's arguments based on 1980. It now remains to consider the other possibilities.

The Indian Claims Commission has addressed the issue of the most appropriate date for calculating a band's treaty land entitlement in its recent report dealing with the treaty land entitlement claim of the Kahkewistahaw First Nation. In that case, the Commission considered the reserve clause in Treaty 4.

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[121] ICC Transcript, December 3, 1996, pp. 77-80 (Thomas Berger).

In this inquiry, the question is again whether Canada satisfied its lawful obligation by setting aside sufficient reserve land, but we are asked to consider the slightly different reserve clause in Treaty 6. Whereas Treaty 4 stated that reserves were "to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians,"[122] the "reserve clause" in Treaty 6 provides:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, provided all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say:–
>
> That the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them. . . .[123]

In the Kahkewistahaw report, we summarized the broad principles that the Commission has derived from the leading decisions of the Supreme Court of Canada on treaty interpretation. Although there is limited case authority on the specific question of treaty land entitlement, we set forth the principles that the Commission has developed in its earlier reports dealing with the treaty land entitlement claims of the Fort McKay, Kawacatoose, and Lac La Ronge First Nations. We do not propose to review all that material again in this report, but we note the following conclusion from the Kahkewistahaw report:

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[122] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 6.

[123] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 352-53 (ICC Exhibit 1).

> While the Commission has not completely ruled out the possibility that other dates might be more appropriate depending on particular facts in other cases, we continue to endorse the general principle that the population on the date of first survey should be used to calculate treaty land entitlement unless there are unusual circumstances which would otherwise result in manifest unfairness. In our view, every claim must be assessed on its own merits, but it is also important to develop and apply a consistent set of principles on treaty land entitlement to avoid the problems that have resulted from frequent changes in government practices and policies over the last century. Not only have these changes frustrated the settlement of outstanding entitlement claims, but the application of *ad hoc* and inconsistent criteria has created inequities and a profound sense of injustice among First Nations.[124]

In other words, in the absence of "unusual circumstances which would otherwise result in manifest unfairness," the Commission will normally apply the date-of-first-survey approach to calculate treaty land entitlement.

In the present case, land was surveyed by John Nelson in 1887 on behalf of members of both the Little Pine and Lucky Man Bands. It is the Commission's view that this represents *prima facie* evidence of the date of first survey for Lucky Man unless the First Nation can show that Treaty 6, unlike Treaty 4, contemplates an entitlement date other than the date of first survey, or that there are unusual circumstances in this case that would make it manifestly unfair to rely on 1887 as the date of first survey.

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[124] Indian Claims Commission, *Kahkewistahaw First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, November 1996), 65-66.

Positions of the Parties

Consultation

With the general principle in the Kahkewistahaw report as a starting point, it is now necessary to consider whether the specific wording of Treaty 6 should result in an interpretation and approach other than date of first survey. The Lucky Man Cree Nation contended that the date-of-first-survey approach is inappropriate. Counsel argued that the phrase "after consulting with the Indians thereof as to the locality" means that Canada's obligation to set aside a reserve for the First Nation arose as soon as the consultation took place. As a fiduciary, Canada was obliged to act with reasonable diligence in setting apart a reserve, and was not permitted to postpone this important matter.[125]

Canada acknowledged that it is obliged to set aside a reserve for a given band within a reasonable period of time following consultation, but contended that the treaty contemplates a reserve selection process and not simply a consultation.[126] Under this process, either Canada or the band would initially identify its chosen location for a reserve, and the other party would have to agree to that choice. The survey would then be conducted based on the best information of the band's population available to the surveyor at the time. Upon completion of the survey, the band could accept the reserve either expressly (by saying so) or implicitly (by living on and using the reserve for its benefit).

Canada objected to the First Nation's date-of-consultation approach on the basis that it represented an attempt by the First Nation to alter its treaty right to be consulted into a right to determine *when* and *where* its reserve would be located.[127] In Canada's view, the final selection of a reserve for a band is an exercise of the royal prerogative; the Crown is not obliged to blindly follow the band's instructions in choosing a reserve location if there are good policy and other reasons for not doing so.[128] Ultimately, Canada contended that, although it is required to exercise its discretion reasonably, it nevertheless retains the right, to be exercised reasonably, to disagree with a band's selection of reserve land.[129]

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[125] ICC Transcript, December 3, 1996, p. 253 (Thomas Berger).

[126] ICC Transcript, December 3, 1996, p. 133 (Richard Wex).

To these submissions, Lucky Man responded that reserve selection is not simply at Canada's discretion, but rather that it is necessary to consider what is reasonable under the treaty.[130] Counsel acknowledged that Canada did not have to set aside a reserve in the location requested by a band, but it was nevertheless obliged to set aside a reserve *somewhere*. Canada could not postpone the reserve selection and survey process for 100 years, and then suggest that the population at that late date of first survey should represent the most appropriate basis for establishing the band's treaty land entitlement.[131]

Settling Down as Condition Precedent to Reserve Selection

The Lucky Man Cree Nation further attacked Canada's approach to reserve selection on the basis that it incorporated a condition precedent – namely, that a band must have settled before its reserve could be set aside – that was not stipulated by Treaty 6.[132] Counsel argued that the reserve clause in Treaty 6 makes it clear that reserves could be set aside before band members actually settled down. It would be reasonable to expect that the Indians would settle down on the "reserves for farming lands" referred to in the reserve clause,[133] but settlement would obviously not be a condition precedent on the "other reserves for the benefit of the said Indians." According to the First Nation, these "other reserves" were intended to ensure that, as settlement advanced, the Indians would have land on which they could later settle.[134] Counsel argued that the treaty provisions were transitional in nature and contemplated that some Indians would be settled on reserves and others would not.[135] Indeed, Canada's practice was not to require a band to settle down if it chose not to do so.[136]

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[127] ICC Transcript, December 3, 1996, p. 192 (Richard Wex).

[128] Submissions on Behalf of the Government of Canada, November 19, 1996, pp. 17-18.

[129] ICC Transcript, December 3, 1996, p. 193 (Richard Wex).

[130] ICC Transcript, December 3, 1996, p. 55 (Thomas Berger).

[131] ICC Transcript, December 3, 1996, pp. 60-61 (Thomas Berger).

Canada countered that the "other reserves" referred to in the reserve clause were merely intended to supplement or enhance the primary farming reserve on which a band settled, but that it would not be possible to locate these "other reserves" without knowing where the principal reserve would be.[137] That being said, it was necessary, in Canada's view, for a band to identify with some particularity the location it desired for its principal reserve. As counsel stated:

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[132] Submissions on Behalf of the Lucky Man Cree Nation, November 26, 1996, pp. 21-29.

[133] ICC Transcript, December 3, 1996, p. 64 (Thomas Berger).

[134] ICC Transcript, December 3, 1996, p. 64 (Thomas Berger).

[135] ICC Transcript, December 3, 1996, pp. 65-66 (Thomas Berger).

[136] ICC Transcript, December 3, 1996, pp. 68-69 (Thomas Berger).

[137] ICC Transcript, December 3, 1996, pp. 139-40 (Richard Wex).

> It cannot be said, under the terms of the treaty, that Canada was obliged to immediately set apart reserves for bands based on the mere possibility that, at some unknown time in the future, a band may settle in a certain general area. The band, in our view, was obliged to identify a location it wanted for its reserve and Canada had to feel reasonably comfortable that the band was sincere in its indication and had fixed its mind on this location before a site could be agreed to. This is entirely inconsistent with Mr. Berger's submission on behalf of his client. We say that, you know, consultation wasn't enough, there had to be a meeting of the minds, Canada had to feel that the band was truly committed to identifying a site, if not to settle immediately, that it would eventually settle on it. Until the band indicated that it was truly prepared to settle on a particular site that was agreeable to Canada, we submit that the implementation of Canada's obligation to set aside a reserve would be postponed in the hope that both parties could agree to a suitable site.[138]

Counsel for Canada noted that, in the treaty negotiations, Commissioner Morris promised that a band would not be held to its reserve selection until the reserve had been surveyed.[139] Therefore, it made sense to determine the band's population at the time when the parties had reached agreement as to the reserve lands to be set aside for the band. Surveying a reserve without a consensus being reached between the parties would, in many cases, result in unnecessary expense, a waste of the surveyor's time, and delays in surveying reserves for bands which *had* agreed with Canada on the land to be set aside.[140]

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[138] ICC Transcript, December 3, 1996, pp. 188-89 (Richard Wex).

[139] ICC Transcript, December 3, 1996, pp. 205-06 (Richard Wex).

[140] ICC Transcript, December 3, 1996, pp. 131-32 (Richard Wex).

Finally, Canada contended that, although the reserve clause does not specifically refer to agreement of the parties, such agreement can be inferred from the following clauses of Treaty 6:

> That during the next three years, *after two or more of the reserves* hereby agreed to be set apart to the Indians, *shall have been agreed upon and surveyed*, there shall be granted to the Indians included under the Chiefs adhering to the treaty at Carlton, each spring, the sum of one thousand dollars to be expended for them by Her Majesty's Indian Agents, in the purchase of provisions for the use of such of the Band as are actually settled on the reserves and are engaged in cultivating the soil, to assist them in such cultivation. . . .
>
> That with regard to the Indians included under the Chiefs adhering to the treaty at Fort Pitt, and to those under Chiefs within the treaty limits who may hereafter give their adhesion thereto (exclusively, however, of the Indians of the Carlton region) there shall, during three years, *after two or more reserves shall have been agreed upon and surveyed*, be distributed each spring among the bands cultivating the soil on such reserves, by Her Majesty's Chief Indian Agent for this treaty in his discretion, a sum not exceeding one thousand dollars, in the purchase of provisions for the use of such members of the band as are actually settled on the reserves and engaged in the cultivation of the soil, to assist and encourage them in such cultivation. . . .[141]

In response to Canada's argument that the Lucky Man Band had not stated a "genuine preference" as to the locality in which it wished to settle, the First Nation replied that Treaty 6 merely required a band to identify a locality, and not a specific area within a locality, in which it desired its reserve.[142] Counsel contended that it would be wise for the Crown's representatives to seek a consensus regarding the lands to be set aside. If, however, no such consensus was forthcoming, Canada's fiduciary obligation to act in the best interest of the band by surveying a reserve – even if the parties were unable to agree on its location – would arise as soon as the consultation had occurred. If Canada failed to set aside a reserve in such circumstances, then, in the First Nation's view, a *prima facie* breach of fiduciary obligation would occur.[143]

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[141] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 354-55 (ICC Exhibit 1). Emphasis added.

[142] ICC Transcript, December 3, 1996, p. 76 (Thomas Berger).

Membership and "Double Counts"

Canada argued that the population levels of the Lucky Man Band in 1880 and 1882 represented "an extremely short-lived moment of an apparently very high number of band members . . . the majority of whom were not . . . actual members of the band but, rather, [were] individuals who joined with Lucky Man around that two-year period for treaty annuity purposes only."[144] The essence of this argument is that the presence of an individual on a given paylist is not necessarily conclusive that the individual was a member of the band with which he or she was paid. Paylist analysis would be required to determine whether the individual actually *was* a member.

Counsel also suggested that large numbers of these individuals on the Lucky Man paylists for 1880 and 1882 later left the Band and joined other bands where they have already been counted for treaty land entitlement purposes. Providing them with treaty land entitlement with Lucky Man would result in "double counts," meaning that Canada would "pay twice" under Treaty 6.[145]

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[143] ICC Transcript, December 3, 1996, p. 255 (Thomas Berger).

[144] ICC Transcript, December 3, 1996, p. 127 (Richard Wex).

These are questions that more properly relate to the question of quantifying the First Nation's population count and treaty land entitlement acreage should it be determined that Canada owes an outstanding lawful obligation to provide treaty land to the First Nation. The present inquiry, however, is concerned only with the issue of whether a lawful obligation is owed in the first place. As we pointed out in Part III of this report, Canada itself noted that the Commission has been asked to refrain from dealing with questions of quantum unless an outstanding lawful obligation is found and the parties are unable to resolve the population count through negotiation. In keeping with the spirit of this request, the Commission does not propose to address the membership and "double count" issues in this report.

Implications of Kahkewistahaw Report

As we have already noted, the oral submissions by counsel in this case took place on December 3, 1996, just one week after the Commission issued its report dealing with the treaty land entitlement claim of the Kahkewistahaw First Nation. In recognition that the parties had not had sufficient opportunity to address the Commission's findings in that report, the Commission permitted counsel to place supplementary written submissions before us to deal with that report.

Before addressing the parties' supplementary submissions, we will set forth certain of the key conclusions the Commission reached in that report:

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[145] ICC Transcript, December 3, 1996, p. 127 (Richard Wex).

> [T]here is nothing in the wording of the treaty or in the subsequent conduct of the parties to suggest that treaty land entitlement should be calculated when the First Nation selected or requested land in a particular location. It is clear that a band's *entitlement* to reserve land arises upon the band signing or adhering to treaty. However, the *quantification* and *location* of the band's entitlement are not triggered until certain procedures described in the treaty are carried out. Under Treaty 4, "*such reserves [are] to be selected* by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, *after conference with each band of the Indians*." In our view, the purpose of the "conference" with the band was to ensure that the land to be set aside as reserve met with the approval of the chief and headmen and that it was suitable for its intended purpose (which was typically agriculture, in the case of bands in southern Saskatchewan). However, it does not necessarily follow that the band's population on the date of selection should determine the size of the reserve. . . .
>
> It was only when *agreement* or *consensus* was reached between the parties to the treaty – by Canada agreeing to survey the land selected by the band, and by the band accepting the survey as properly defining the desired reserve – that the land as surveyed could be said to constitute a reserve for the purposes of the treaty. Therefore, the date of first survey was significant because, if the band accepted the surveyed land as its reserve, the completion and acceptance of the first survey provided evidence that both parties agreed that the land would be treated as an Indian reserve for the purposes of the treaty. Since the survey is important evidence of Canada's intention to establish a reserve, it is not unreasonable to use the date on the survey plan as the date of first survey for entitlement calculation, provided that the completion of the physical survey of the reserve boundaries can be shown to have coincided roughly with the preparation of the survey plan. Once it has been concluded that a reserve has been set aside, the population must be assessed on this date to determine whether Canada has satisfied the band's treaty land entitlement. . . .
>
> A completed survey verifies the precise *location* and *size* of a reserve, and is critical in measuring whether a band's treaty land entitlement has been fulfilled. A completed survey does not necessarily

> confirm, however, that the "first survey" of a band's reserve has *occurred*, particularly where the band rejects the lands as surveyed.
>
> Therefore, we find the most reasonable conclusion to be derived from the interpretation of Treaty 4 is that the date of first survey is the appropriate date for calculating treaty land entitlement. We interpret the Crown's obligation under Treaty 4 to be the allocation of 128 acres of land for each band member at the time that land was *set apart* as a reserve for the use and benefit of the band. It was only when land was *surveyed* by Canada in accordance with the treaty, and *accepted* by the band, that it could be said that the land was properly set apart. Therefore, subject to exceptions being made in unusual circumstances which would otherwise result in manifest unfairness, the general rule is that the population on the date of first survey shall be used to calculate a band's treaty land entitlement.[146]

In light of the facts of the present case, it is not surprising that Canada's submissions echo the approach taken by the Commission in the Kahkewistahaw report. Counsel noted that the purpose of the "consultation" under Treaty 6, like the "conference" under Treaty 4, was to ensure that the lands to be set aside as the band's reserve met with the approval of the Chief and headmen and would be suitable for its intended purpose. Canada's approach, which contemplates a meeting of the minds or a consensus with regard to the lands to be selected, is consistent with the Commission's comments in Kahkewistahaw.

For its part, the First Nation did not disagree with the Kahkewistahaw report, as far as it went. However, the First Nation contended that the survey process contemplated in the Kahkewistahaw report reached an impasse in the present case when the parties were unable to achieve the necessary agreement or consensus on the lands to be set aside:

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[146] Indian Claims Commission, *Kahkewistahaw First Nation Report on Treaty Land Entitlement* (Ottawa, November 1996), 67-69 and 72-73.

> The principles set out in the *Kahkewistahaw* case proceed on the footing that steps are taken in a reasonable way: a band adheres to the treaty, consultation between Canada and the Band takes place, and then consensus is reached, i.e., Canada agrees to survey the lands selected, and the Band accepts the survey as properly defining the reserve.
>
> The Commission pointed out that there had to be *agreement* or *consensus* "by Canada agreeing to survey the land selected by the band, and by the band accepting that the survey has properly defined the desired reserve. . . ."
>
> But what happens where no agreement or consensus is reached? What if there is an impasse?
>
> What is the situation where the procedure is aborted? Where consultation takes place but no steps are taken thereafter? Where no agreement or consensus is reached? Where no survey is carried out for over 100 years?
>
> This is where the exception to the general rule as set out in the *Kahkewistahaw* case must come into play: Are these circumstances unusual? Would application of the DOFS [date of first survey] rule result in manifest unfairness?[147]

In the First Nation's submission, the circumstances were unusual and using the date-of-first-survey approach would result in manifest unfairness. It was "not only unusual" but "unique," counsel noted, that, notwithstanding the consultations in 1880 and 1882, the members of the Lucky Man Band were eventually placed on Little Pine's reserve and no reserve was set aside for Lucky Man for over 100 years.[148] The First Nation argued that Canada's unilateral imposition of a requirement that a band settle before a reserve would be set aside for it, when such a term is not required by treaty, is manifestly unfair. Moreover, since Lucky Man had "virtually settled" in 1883 but still no reserve was set apart for its use and benefit, it would again be manifestly affair to apply the Kahkewistahaw approach in this case. Canada was responsible, as a fiduciary, to proceed with reasonable diligence in surveying a reserve for the Band, and, as a fiduciary, it is responsible for not having done so, according to the First Nation.[149]

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[147] Supplementary Submission on Behalf of the Lucky Man Cree Nation, December 19, 1996, p. 2.

[148] Supplementary Submission on Behalf of the Lucky Man Cree Nation, December 19, 1996, p. 6.

Consensus and Date of First Survey

Having had careful regard for the parties' submissions, the Commission concludes that Canada has put forward the most reasonable interpretation of the reserve clause in Treaty 6. The contentious words of the reserve clause are contained in the phrase "after consulting with the Indians thereof as to the locality which may be found to be most suitable for them." In our view, the word "consulting" contemplates the initial discussions in which an Indian band informs Canada's agents of its preferred location for a reserve. We agree with Canada's point, however, that other clauses in the treaty give fuller expression to the parties' intention that a band's reserve shall be "*agreed upon* and surveyed." It is just this sort of consensus or meeting of the minds that the Commission referred to in its report dealing with the Kahkewistahaw Band of Treaty 4, and we believe that this conclusion is equally applicable to bands under Treaty 6.

The Lucky Man Cree Nation argued that the obligation to set aside a reserve arose as soon as "consultation" took place. In fact, we consider that the obligation to set aside a reserve arose even earlier - upon a band's adhesion to treaty. As we stated in the Kahkewistahaw report, however, the *quantification* and *location* of a band's entitlement were not triggered until the consensus contemplated by the treaty was achieved. As a general rule, the consensus to which we refer would normally occur upon *completion* of the survey – that is, at the date of first survey. It is true that there had to be a preliminary understanding of some sort between Canada and a band with respect to a specific location before a survey would even be undertaken. In our view, this preliminary understanding was not sufficient to constitute the consensus that we contemplate. It was only *following* the survey, when the band indicated its acceptance of the surveyed area as its reserve – either expressly (by saying so) or implicitly (by living on or using the reserve for its benefit) – that a true consensus could have been said to exist. It is for these reasons that the Commission attaches such significance to the date of first survey.

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[149] Supplementary Submission on Behalf of the Lucky Man Cree Nation, December 19, 1996, pp. 6-7.

That being said, we agree with the First Nation that the treaty does not require a band to settle down before a reserve can be set apart for it. We further agree that the treaty provisions themselves were transitional in nature and contemplated that some bands would settle on reserves immediately and others would not.[150] Still, as Canada contended, before a reserve would be set aside for a band, Canada had to "feel reasonably comfortable" that the band was truly committed to identifying a site, if not to settle immediately, then to settle there eventually.[151]

We find support for these conclusions in the report of Treaty Commissioner Alexander Morris regarding the Treaty 6 negotiations of August 19, 1876:

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[150] ICC Transcript, December 3, 1996, pp. 65-66 (Thomas Berger).

[151] ICC Transcript, December 3, 1996, p. 188 (Richard Wex).

> Now what I and my brother Commissioners would like to do is this: we wish to give each band who will accept of it a place where they may live; we wish to give you as much or more land than you need; we wish to send a man that surveys the land to mark it off, so you will know it is your own, and no one will interfere with you. What I would propose to do is what we have done in other places. For every family of five a reserve to themselves of one square mile. Then, as you may not all have made up your minds where you would like to live, I will tell you how that will be arranged: we would do as has been done with happiest results at the North-West Angle. *We would send next year a surveyor to agree with you as to the place you would like.*[152]

Four days later, during the fourth day of negotiations, Commissioner Morris was asked to include among the terms of treaty that the Indians be permitted to retain "liberty to change the site of the reserves before the survey."[153] To this request, Morris responded:

> You can have no difficulty in choosing your reserves; be sure to take a good place so that there will be no need to change; you would not be held to your choice until it was surveyed.[154]

We take from these passages that Canada and the Indians who adhered to Treaty 6 intended that the consultation process would ultimately result in some form of an agreement - whether express or implied, written or oral - between Canada and a band as to the reserve land to be set aside for that band's use and benefit. We also find it significant that the intention was clearly expressed that a band would not be held to its choice of land until its reserve was surveyed. It is our view that this concession, granted at the specific request of the Indians, makes it reasonable to conclude that the parties did not intend to finally resolve the question of a band's treaty land entitlement until the parties had agreed on the reserve lands to be set aside, and those lands had been surveyed.

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[152] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 204-05 (ICC Exhibit 1).

[153] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 185 (ICC Exhibit 1).

[154] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 218 (ICC Exhibit 1).

Nonetheless, the Commission does not accept Canada's contention that setting aside reserve land is simply a matter of royal prerogative, and that Canada, rather than a band, is "the decision maker as to both when and where the reserve would be located."[155] Canada was required to "consult" with the Indians by the express terms of Treaty 6. For a true meeting of the minds to take place, both parties must have input into the process, and both must agree on the reserve selected and surveyed.

Arguably, the logical extension of this requirement for consensus is that, just as it would have been open to a band to reject for its own reasons a reserve site selected by Canada, it would have been equally open to Canada to reject sites requested by the band if there were valid reasons for doing so. Canada's discretion in this regard would presumably have to have been exercised reasonably, however. One of the most important - and difficult - roles of government, then and now, is to weigh and reconcile competing interests, and in doing so Canada must have particular regard for treaty rights and the fiduciary nature of its relationship with the Indians. We do not consider this to mean that Canada was immutably bound to prefer the position of the Indians in all cases in which competing policy or other interests arose. What it *does* mean, in our view, is that, if, in the context of setting apart reserves, Canada chose a competing interest over the interests of a particular band, it must have had reasons for doing so that were valid and not coloured by improper considerations.

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[155] Submissions on Behalf of the Government of Canada, November 19, 1996, p. 17.

Manifest Unfairness

We have already stated in this report and in our previous treaty land entitlement reports that, as a general principle, the Commission will normally apply the date-of-first-survey approach to calculate treaty land entitlement. Completion and acceptance of the first survey - and, in most cases, settlement by the band - represent evidence that both parties agreed that the land would be treated as an Indian reserve for the purposes of the treaty. We have also concluded that the survey in 1887 by John Nelson represents *prima facie* evidence of the date of first survey for Lucky Man. Since it is our view that the date of first survey represents the appropriate date for calculating treaty land entitlement under Treaty 6 as well as under Treaty 4, the remaining question that the Commission must address is whether there are unusual circumstances in this case that would make it manifestly unfair to rely on 1887 as the date of first survey.

With this question in mind, we will now consider the historical circumstances surrounding the three dates for calculating treaty land entitlement proposed by the Lucky Man Cree Nation - 1880, 1882, and 1883 - and the fourth date - 1887 - proposed by Canada.

Events of 1880

It will be recalled that Indian Agent Edwin Allen reported on September 30, 1880, that he had "held several councils with the Indians who had not yet determined on a reservation with a view of ascertaining their opinion on the matter," and that "Lucky Man wished to locate in the neighbourhood of Battleford."[156] Allen also reported that he "could get no definite answer from any of the chiefs as to when they would settle down."[157]

In the submission of the Lucky Man Cree Nation, Allen's discussions with the Indians constituted the consultation required by Treaty 6 and thus triggered Canada's obligation to set apart a reserve for the Band. As counsel stated:

> As time goes by, and settlement proceeds, choices as to locations dwindle. The responsibility was one which could not be shirked. It is the essence of the Crown's fiduciary duty to act in the best interests of the band. The Crown should have performed its duty under the treaty. In this case there was consultation in 1880 when Lucky Man indicated that he and his followers wished to locate in the neighbourhood of Battleford. There was no reason not to set aside a reserve at Battleford in 1880, unless this argument of the Crown that the Indians had to be ready to settle down is a sound argument.[158]

Canada responded that, although Lucky Man did indicate a general location for a reserve, he "only made these indications for much needed governmental aid

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[156] Edwin Allen, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1880" (ICC Documents, p. 26).

[157] Edwin Allen, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1880" (ICC Documents, p. 26).

[158] ICC Transcript, December 3, 1996, p. 56 (Thomas Berger).

. . . and he had not fixed his mind on a site."[159] Counsel argued that the record shows that Lucky Man and his followers were destitute and anxious to receive their annuity payments so that they could return to the plains and to the United States to hunt for buffalo.[160] Canada also argued on the basis of Agent Allen's report that Lucky Man refused "to provide a firm commitment . . . as to when he would settle or identify a particular site,"[161] and on this basis Canada denied that it had an obligation to set apart a reserve for Lucky Man in 1880.

It is clear enough from Allen's report and from other reports in both earlier and later years that Canada's policy objective at the time was to encourage all bands of plains Indians, through occasionally dubious means, to select and settle on reserves as soon as possible to reduce the potential for conflict with settlers over land selection and to hasten the bands' transition to agricultural self-sufficiency. It is also clear from Allen's report that the Indians of the Lucky Man Band were more interested in pursuing the hunt than in identifying a specific location where they would have liked to settle:

> The Indians were in a very destitute condition, almost without clothing of any description, and from 15 to 20 persons in each lodge; they came from the plains with the expectation of receiving their payments and purchasing clothing, &c., *before returning again*. . . .[162]

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[159] ICC Transcript, December 3, 1996, p. 142 (Richard Wex).

[160] ICC Transcript, December 3, 1996, p. 147 (Richard Wex).

[161] ICC Transcript, December 3, 1996, p. 186 (Richard Wex).

[162] Edwin Allen, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880" (ICC Documents, p. 26). Emphasis added.

The evidence before us points to the conclusion that Canada was willing to set apart reserves for any Indian bands desiring them, but, other than making a general expression of interest in the Battleford area, Lucky Man and his followers were not yet ready to select a specific site in 1880. In the overall context of Allen's report and all the historical evidence we have reviewed, it is obvious that Lucky Man and his followers were more concerned about hunting buffalo in 1880 than turning their minds to selecting a specific reserve site. This conclusion is reinforced by Indian Commissioner Edgar Dewdney's comment in February 1881 when he referred to Lucky Man and certain other bands as "the wildest of our Plains Indians [who] have remained out as long as there was any chance of getting Buffalo."[163]

In short, there is no evidence before the Commission of any common understanding regarding a specific parcel of land between Canada and the Band in 1880. As a result, we cannot conclude that Canada owed a lawful obligation to unilaterally set apart a reserve for Lucky Man that year, nor do we judge Canada's failure to do so to be manifestly unfair in the circumstances.

Events of 1882

We find that, with the exception of the proposed reserve location in the Fort Walsh area – and the additional complications that this location created – the circumstances of the 1882 "consultation" were very similar to those in 1880. The bands of Lucky Man and other Chiefs arrived at Fort Walsh after an unsuccessful hunt, and, with the onset of cold weather and lacking food and warm clothing, they were suffering from exposure and starvation. Piapot returned from the north with complaints about the "reception" that he and his people had received there, and he "received the sympathy of the other chiefs who were in no manner anxious to go northward."[164] While negotiating with the bands "in view of moving these Indians northward," Canada issued rations "sparingly" to encourage compliance.[165] Under pressure to select and move onto northern reserves, Lucky Man and Nekaneet instead requested reserves at Big Lake about 30 miles east of Fort Walsh. More tellingly, perhaps, they sought their annuity payments so that they could undertake their winter buffalo hunt.[166]

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[163] Edgar Dewdney, Indian Commissioner, to T.P. Wadsworth, Inspector of Indian Agencies, February 21, 1881, NA, RG 10, vol. 3726, file 27335 (ICC Documents, p. 48).

Canada again argued that Lucky Man had no sincere intention to settle or select a reserve in 1882, and merely indicated Big Lake as a reserve location to obtain annuities and other provisions. Counsel submitted that, in these circumstances, Canada was not obliged to set apart a reserve since the Band was still not prepared to give up its traditional lifestyle and choose a site. In response to this submission, counsel for Lucky Man replied:

> But Mr. Wex says, he says, well that wasn't genuine, they only did it because they were desperate and they wanted rations. Well this

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[164] A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1883, Canada, Parliament, *Sessional Papers*, 1883, No. 23, "Annual Report of the Department of the Interior for the Year 1882," Part III, North-West Mounted Police Force (ICC Documents, p. 167).

[165] A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1883, Canada, Parliament, *Sessional Papers*, 1883, No. 23, "Annual Report of the Department of the Interior for the Year 1882," Part III, North-West Mounted Police Force (ICC Documents, p. 167).

[166] A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1883, Canada, Parliament, *Sessional Papers*, 1883, No. 23, "Annual Report of the Department of the Interior for the Year 1882," Part III, North-West Mounted Police Force (ICC Documents, p. 167).

> doesn't, in my submission, Mr. Commissioner, mean that it wasn't a choice that they made. If you make a choice because you're desperate it's still a genuine choice. And Indians throughout the history of our country have had to make those choices because they were desperate, it was the only choice open to them. And it doesn't lie in the mouth of the Crown 100 years later to say, well you only made that choice, you only chose Big Lake because you were desperate. I submit, with respect to Mr. Wex, that that's not an answer to the selection of Big Lake by Lucky Man in 1882.[167]

In our view, the question that the Commission must properly decide is *not* whether the Band requested a reserve, or whether the Band intended to select a reserve or conversely intended to continue hunting buffalo. The real question is whether the parties agreed on the land to be set apart for the Band. We do not see in the events of 1882 any evidence that Canada and Lucky Man reached any such agreement, either expressly or implicitly. In this context, we cannot conclude that Canada was under a lawful obligation to set apart a reserve for the Band in 1882.

The First Nation argued that the reason a site was not selected in 1882 was that the parties reached an impasse because Canada was not willing to set apart a reserve at Big Lake as requested by the Band. Canada contended that there were good reasons for its refusal:

- Lucky Man and the other Treaty 6 Indians who had regularly congregated in the Fort Walsh area in the late 1870s and early 1880s had already been advised by 1882 that they would have to go north to receive their treaty land and future annuities, so they knew that selecting reserve lands near Fort Walsh would not be acceptable to Canada.[168]

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[167] ICC Transcript, December 3, 1996, pp. 260-61 (Thomas Berger).

[168] ICC Transcript, December 3, 1996, p. 197 (Richard Wex).

- Big Lake is located within the geographical area described in Treaty 4, whereas Lucky Man – described by Dewdney as "anxious to be in Treaty 6"[169] – had adhered to the later treaty. As Deputy Superintendent General Lawrence Vankoughnet instructed Dewdney:

  > The removal of Indians from within the limits of a treaty to which they were parties to another treaty in which they have no interest is, as you are aware, considered very objectionable by the Department.
  >
  > Complications which it is most desireable to avoid are almost certain to arise at some time or another unless the status of the Bands included within the various treaties is carefully preserved. . . .[170]

  Counsel for Canada noted that one such "complication" was the difference in the benefits provided under the various treaties.[171]

- The soil and climatic conditions in the Fort Walsh area were not considered to be conducive to agriculture and settlement.[172]

- As the buffalo became more scarce and the Indians were forced to travel farther afield – particularly into the United States – to sustain themselves, heightened tensions among settlers and Indians on both sides of the border and the interest in maintaining international relations led to Canada discouraging Indians from remaining in locations near the boundary.[173]

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[169] Edgar Dewdney, Indian Commissioner, to T.P. Wadsworth, Inspector of Indian Agencies, February 21, 1881, NA, RG 10, vol. 3726, file 27335 (ICC Documents, p. 47).

[170] Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, May 11, 1882, NA, RG 10, vol. 3744, file 29056-3 (ICC Documents, pp. 122-23).

[171] ICC Transcript, December 3, 1996, p. 198 (Richard Wex).

[172] ICC Transcript, December 3, 1996, pp. 151 and 199-200 (Richard Wex).

[173] ICC Transcript, December 3, 1996, pp. 151-52 and 196 (Richard Wex).

The First Nation did not suggest that Canada's policies in 1882 were misstated by counsel for Canada in this inquiry, but counsel for Lucky Man countered that the Commission must look to the terms of Treaty 6, and not Canada's policy, to determine Canada's outstanding lawful obligations to the First Nation. Therefore, Canada's relations with the United States, and Lucky Man's own knowledge that a reserve in the Cypress Hills would be unacceptable to Canada, were irrelevant considerations.[174] Counsel also noted that Treaty 6 did not limit where reserves for bands adhering to that treaty were to be located, whereas, by way of comparison, the Indian signatories to the treaty surrendered their claims to *all* lands, not only within the Treaty 6 area but also throughout Canada.[175] Counsel further implied that Lucky Man should have been able to claim a reserve within the Treaty 4 area since the Band had adhered to Treaty 6 at Fort Walsh and had been paid there from 1879 to 1882.[176] Finally, the First Nation argued that, if the soil conditions in and around the Cypress Hills were unsuitable, then Canada should have set apart a reserve elsewhere in a locality where the soil *was* suitable.[177]

As we stated earlier in our analysis, selecting a location for Lucky Man's reserve was not a decision that either Canada or the Band could make on its own. Even if the Band *was* sincere in its desire to locate at Big Lake – and, based on the evidence, we are not persuaded that it was – it is at least arguable that Canada could disagree with the Band's choice of land in that area if it had good reasons for doing so, just as it would have been open to the Band to refuse to accept a reserve unilaterally selected by Canada in a location considered unsuitable by the Band.

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[174] Submissions on Behalf of the Lucky Man Cree Nation, November 26, 1996, pp. 29-33.

[175] Submissions on Behalf of the Lucky Man Cree Nation, November 26, 1996, pp. 31-32.

[176] Submissions on Behalf of the Lucky Man Cree Nation, November 26, 1996, p. 32.

[177] Submissions on Behalf of the Lucky Man Cree Nation, November 26, 1996, p. 32.

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Although the First Nation condemned the reasons advanced by Canada for refusing in the early 1880s to permit Lucky Man and other bands to settle near Fort Walsh, we note that even counsel for the First Nation was prepared to concede that Canada was earnest in its efforts to have Lucky Man settle down.[178] At that early date there likely were any number of potential reserve locations that would have been well-suited to the Band's needs and desires – if the Band had been interested in identifying a reserve. *We find that the Band was simply not ready to do so in 1882*. This is not intended as a condemnation of the Band's motives and intentions, although they were clearly contrary to Canada's wishes and frustrated many of the officials who were called upon to deal with the Band. In fact, the Commission must admire the independence of spirit and the fierce determination with which the Band sought to retain its traditional way of life. Nevertheless, as long as the Band was unwilling to select a specific reserve, we must conclude that Canada was not lawfully obliged to do so unilaterally, and that failing to do so was not manifestly unfair in the circumstances.

Relocation to Battleford in 1883

Despite Lucky Man's reluctance to move north to the Battleford area and give up his nomadic way of life, the record shows that the Band *had* left for the Battleford area by July 2, 1883, with the few who ventured to return to the Cypress Hills being returned north under police escort.[179] The First Nation relied on the notation in the Department's year-end Annual Report for 1883 as evidence that Lucky Man's people "may be considered as virtually settled, as they are being kept working in neighbourhood of Battleford prior to moving to Reserve, being adjacent."[180] In addition to this reference to the Band being "virtually settled," counsel for the First Nation relied on two other facts to show that the Band must have settled in 1883. First, Dewdney advised Assistant Indian Commissioner E.T. Galt on March 5, 1883, of his intention to number all reserves in Manitoba and the North-West Territories, and in fact the number "117" was assigned to Lucky Man,[181] although no formal reserve had yet been surveyed for the Band. Second, Lucky Man's 1884 paylist demonstrates that 82 people were paid with the Band "at Reserve."[182]

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[178] ICC Transcript, December 3, 1996, pp. 262-63 (Thomas Berger).

However, the evidence also shows that in *1883* – contended by the First Nation to be the year in which the Band settled down – Lucky Man's people were paid at *Battleford*[183] and *not* on a reserve. Indian Agent Rae's 1884 report indicates that the members of both the Lucky Man and Little Pine Bands "were kept close to

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[179] Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, October 2, 1883, Canada, Parliament, *Sessional Papers*, 1884, No. 4, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1883" (ICC Documents, p. 186).

[180] Canada, Parliament, *Sessional Papers*, 1884, No. 4, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1883" (ICC Documents, p. 190).

[181] ICC Transcript, December 3, 1996, p. 72 (Thomas Berger).

[182] Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

[183] Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

Battleford" during the fall and winter of 1883 and did not move off to reserves until the spring of 1884. We have also had regard for the fact that there is no evidence of an Indian Reserve 117 being set apart for Lucky Man, and indeed that number was eventually reassigned to the Witchekan Lake Band. More to the point, however, although Lucky Man and his people may have been leaning toward selecting a reserve in the Battleford area in 1883, we see nothing in the events of that year to suggest that Canada and the Band reached any sort of agreement on a specific parcel of land to be surveyed and set apart as the Band's reserve. For this reason, we cannot conclude that Canada was lawfully obliged to set apart a reserve for the Band in 1883, or that failing to do so was manifestly unfair in the circumstances. Even if we had concluded that "settling down" *was* a condition precedent to setting apart a reserve, we still cannot conclude on the evidence before us that the Lucky Man Band had in fact settled in 1883.

Events of 1884

The evidence shows that, after spending the fall and winter of 1883 in the vicinity of Battleford, Lucky Man and his people moved off "towards their reserve near Poundmaker's" in the spring of 1884.[184] It appears that, before reaching "their reserve," the members of both bands stopped off at Poundmaker's reserve, where they remained for a lengthy period of time until, with rations withheld as long as they failed to move, and finally driven by hunger, they agreed to go on to "their reserve." Rae commented that "[m]ost of Lucky Man's men joined Little Pine, who has always shown himself well inclined."[185] Dewdney later commented in his annual report of November 25, 1884, that "[a] few of the Indians who came from the South the year before last, have not selected a reserve, notably those under Big Bear and Lucky Man."[186] Dewdney also reported that Big Bear, despite repeated promises to go to a reserve, remained unsettled, and that Lucky Man's followers had joined him.

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[184] J.M. Rae, Indian Agent, to Superintendent General of Indian Affairs, October 13, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year ended 31st December, 1884" (ICC Documents, p. 236).

We agree with Canada's characterization of the situation when it contended that Lucky Man's Band had split, with some members settling with Little Pine and others, including Lucky Man himself, rejoining Big Bear.[187] That faction of the Band in transit with Big Bear did not appear to have any desire or intention to select or settle on a reserve. With respect to the remainder of the Band which appears to have settled with Little Pine in 1884, the only evidence before us is Little Pine's request to have the selection and survey of a reserve postponed.

In our view, although "settling down" does not constitute a condition precedent to setting apart a reserve, the fact that a band in a given case *has* settled down is a strong indication that the band has chosen the land that it would like to have set apart as its reserve. We find that, in this case, Canada responded in an appropriate and timely manner by having Nelson on hand in 1884 to survey a reserve for those members of the Little Pine and Lucky Man Bands who had decided to settle. However, in light of Little Pine's refusal to permit a survey to proceed, we do not see how it can be concluded that Canada was lawfully obliged to set apart a reserve for the Band in 1884, or that failing to do so was manifestly unfair in the circumstances.

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[185] J.M. Rae, Indian Agent, to Superintendent General of Indian Affairs, October 13, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year ended 31st December, 1884" (ICC Documents, p. 236).

[186] Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, November 25, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year ended 31st December, 1884" (ICC Documents, p. 246).

[187] ICC Transcript, December 3, 1996, p. 169 (Richard Wex).

The 1885 Rebellion and Its Aftermath

We have already described the turmoil associated with the rebellion of 1885 as well as the steps taken by Canada in the wake of the violence. There was no evidence adduced by either Canada or the Band to suggest that the parties even turned their minds to the question of selecting land to be set apart as a reserve for the Band in 1885.

Given the chaos and uncertainty spawned by these circumstances, we conclude that, even if Canada became obliged to proceed diligently to set apart a reserve for the Band after 1884, it was not reasonable to require or expect it to do so in 1885. The circumstances of 1885 were unusual and indeed unique, but, that being said, we do not find any manifest unfairness in the fact that a reserve was not set apart.

Survey of Indian Reserve 116 in 1887

The Commission has already addressed at length in this report, and in the reports of its other treaty land entitlement inquiries, its philosophy in relying, as a matter of general principle, on the date-of-first-survey approach to the calculation of treaty land entitlement. In the final analysis, we conclude that the approach is appropriate in this case and that the date of first survey for the Lucky Man Band was 1887 when Nelson surveyed IR 116.

We agree with Canada's statement that important objectives of the parties in entering into Treaty 6 were to facilitate the orderly settlement of the prairies, to minimize conflict between Indians and non-Indians, and to provide the Indians with a land base based on population.[188] We also agree with counsel for Lucky Man that the treaty provisions were transitional in nature and contemplated that some Indians would settle on reserves immediately and others would not.[189] We conclude that, in light of Treaty Commissioner Morris's promise that bands would not be held to their choice of land until the survey was performed, it would have been reasonable for the parties to anticipate that a band's entitlement would similarly not crystallize until the survey took place. Finally, we also conclude that the terms of Treaty 6 contemplate a consensus between the parties on the question of reserve selection, rather than mere "consultation" in the limited sense proposed by the First Nation.

Canada argued that, when Nelson arrived in 1887 to survey in the Battleford area:

> he found that the remaining members of both the Little Pine and Lucky Man Bands had settled together. He consequently surveyed the reserve for both bands. The reserve was set aside for *both* Lucky Man and Little Pine Bands by Order in Council P.C. 1151, dated May 17, 1889.[190]

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[188] Submissions on Behalf of the Government of Canada, November 19, 1996, p. 42.

[189] ICC Transcript, December 3, 1996, pp. 65-66 (Thomas Berger).

[190] Submissions on Behalf of the Government of Canada, November 19, 1996, p. 44.

Nelson's survey plan of IR 116 specifically states that it was prepared "For the Bands of Chiefs 'Little Pine' & 'Lucky Man'" and that the land was surveyed in September 1887.[191] We find, on the basis of this evidence, that Canada has established, at least on a *prima facie* basis, that IR 116 was surveyed for both the Little Pine and Lucky Man Bands in 1887.

Are the circumstances of this case so "unusual" that the application of the date-of-first-survey approach would result in manifest unfairness to the Lucky Man Cree Nation? It will be recalled that the First Nation argued that the circumstances *were* unusual because the Band was consulted in 1880 and 1882, and settled in 1883, but it was "placed on the reserve . . . set aside for the Little Pine Band" in 1887 and did not receive a reserve of its own until 1989.[192] With respect to the events of 1887, counsel for the First Nation added:

> Then [counsel for Canada] said that in 1887 both bands chose I.R. 116, he said they jointly agreed. He said finally there was a meeting of the minds. We don't know any of that. All we know is that after the rebellion they were there. And given all of these events, the failure to set aside the reserve, the rebellion and the aftermath, all we know is that they were there and treated as a continuing band, called "a subsidiary band" in one of the reports, maybe that's a reasonable way of describing it because they didn't have their own reserve, they were a subsidiary band living on another band's reserve.[193]

We have already considered and rejected Lucky Man's argument based on the content of "consultation," and we disagree with the First Nation's contention that

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[191] Order in Council PC 1151, May 17, 1889 (ICC Documents, pp. 410-12).

[192] Supplemental Submissions on Behalf of the Lucky Man Cree Nation, December 19, 1996, p. 6.

[193] ICC Transcript, December 3, 1996, p. 270 (Thomas Berger).

Canada's approach requires a band to settle before land will be set apart for it. The new concern raised by the First Nation is whether the survey of 1887 represented a true meeting of the minds, or alternatively whether the Band had settled on Little Pine's reserve merely because it believed it had no other options or it was forced to do so by the Crown.

We have already stated that the consultation process must ultimately result in some form of an agreement - whether *express* or *implied* - between Canada and a band regarding the reserve to be set aside for the band's use and benefit. In this case, we conclude that there was such a consensus or meeting of the minds in 1887.

In his year-end report, Nelson stated that "Mr. Gopsil and I examined the lands upon which the bands of 'Little Pine' and 'Lucky Man' have settled, and I decided to make the reserve five miles square as shown by the accompanying plan, marked (*d*), and proceeded with the survey."[194] Clearly, by 1887, the members of the Little Pine and Lucky Man Bands had already been settled for some three years. Whether Nelson *actually* discussed reserve selection with the Lucky Man Band, or simply surveyed land to reflect the settlement of the Little Pine and Lucky Man Bands as he found them, we do not know. However, unlike preceding years in which Big Bear, Little Pine, Lucky Man, and their people had continued their nomadic pursuit of the buffalo, it was obvious to Nelson in 1887 when he arrived to perform the survey that there were specific lands with which the Band had chosen to associate itself. As we stated previously, "settling down" does not constitute a condition precedent to setting apart a reserve, but the fact that the Band *had* settled down was a strong indication that it had chosen the land it wanted to have set apart as its reserve. In this way, the Band demonstrated through its actions that it was prepared to take these lands as its reserve, and it was on the basis of this understanding that Nelson conducted the survey.

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[194] John C. Nelson, D.L.S., in charge Indian Reserve Surveys, to Superintendent General of Indian Affairs, Annual Report, December 30, 1887, Canada, Parliament, *Sessional Papers*, 1888, No. 15, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1887" (ICC Documents, pp. 374-75).

It is perhaps more significant, however, that none of the evidence before the Commission suggests that the members of the Little Pine and Lucky Man Bands were dissatisfied with the lands surveyed for their joint use and benefit. We commented in the Kahkewistahaw report that a band might express its disapproval of lands surveyed for it by objecting to Canada's officers or simply by refusing to live on or use the reserve as surveyed. Alternatively, band members might accept the reserve as set apart by the surveyor, either expressly by stating their approval or implicitly by residing on and using the reserve for their collective benefit.[195] In the present case, the evidence demonstrates that the Band continued to reside on and use IR 116 until the new reserve was set apart for its sole use and benefit in 1989. We also understand that, as the new reserve is entirely made up of grazing lands which the First Nation leases to third parties, members of the First Nation continue to reside on IR 116 to this day.

Was the Band forced to live on Little Pine's reserve, or did it believe that it had no other alternative? It is clear that inhabiting a reserve near Battleford did not represent the Band's preferred way of life. Those members of the Band who had tried to return to the Cypress Hills in 1883 were marched back to Battleford under the watchful eye of the North-West Mounted Police. These people were, first and foremost, buffalo hunters, and, while the pickings were admittedly slim at Fort

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[195] Indian Claims Commission, *Kahkewistahaw First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, November 1996), 68-69.

Walsh, there appears to have been no opportunity at all to hunt buffalo at Battleford.

Later, in the wake of the 1885 rebellion, many bands - particularly those such as Lucky Man ~~which~~ that Canada considered "disloyal" - had their annuities temporarily eliminated or reduced, and were restricted in their movements and activities. Clearly, circumstances had changed, and it was likely very difficult for a band to express its dissatisfaction with a reserve *after* the rebellion with the same sense of fiery independence or determination that it might have been prepared to demonstrate *before* the rebellion. Nevertheless, it is also clear that, in the two years preceding the rebellion, many members of the Lucky Man Band resisted settling down and continued to travel with Big Bear. After the rebellion, some chose to flee to the United States because of their fear of reprisals and their desire to retain their traditional lifestyle. Other Indians, such as the members of the Nekaneet Band, continued to defy the government by remaining in the Cypress Hills. In these desperate and tragic times, Lucky Man's people were forced to make difficult choices, and most chose to stay on IR 116.

We note the following passage from the First Nation's submissions with regard to the significance of IR 116:

> In 1896, when Lucky Man returned from the U.S., with a remnant of his followers, he was put in jail, and his *followers were returned to the Little Pine reserve*. They were treated as rebels there, and some of them fled again to the U.S. . . . This does not alter the fact that when they returned to Canada they were returned to I.R. #116, *the reserve on which they had formerly resided, and where the members of the Band had settled*. (In 1887 Nelson surveyed #116 and referred to the

> lands upon which Little Pine *have settled*. . . . As was noted earlier, such settlement had taken place in 1883.[196]

Although we disagree with the First Nation's contention that settlement on IR 116 had taken place by 1883, we nevertheless agree that IR 116 was where the Band had settled - and *remained* settled. It was not until 1887, however, that Canada and the Band agreed that this land would be surveyed and set apart for the use and benefit of the Band under Treaty 6.

The record before us is virtually devoid of references to the Lucky Man Band in 1886. Had there been no survey by Nelson in 1887, we might have questioned why there was no evidence of steps being taken by Canada to confirm the Band's choice of reserve lands by conducting a survey in 1886. Since there *was* a survey in 1887, however, we are prepared to find, based on our experience in these matters, that the delay from 1886 to 1887 was not significant. In addition, we conclude that the interval between the time of treaty in 1879 until the survey in 1887 was not, in the circumstances of this case, unusual. More importantly, we cannot say that the delay was entirely attributable to Canada, nor indeed that it resulted more from Canada's actions or failure to act than those of the Band. In fact, we are more inclined to conclude that the delays were primarily attributable to the Band's desire to maintain its traditional way of life and its reluctance to select and settle on a reserve.

Therefore, we are of the view that the application of the date-of-first-survey approach in the circumstances of this case would not result in manifest unfairness to the Lucky Man Cree Nation. We appreciate that, without the benefit of paylist analysis, it might appear unfair that the First Nation's treaty land entitlement should be calculated using its 1887 population of 62 as a starting point rather than the much higher populations of 754, 872, or 366 in 1880, 1882, and 1883, respectively.

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[196] Submissions on Behalf of the Lucky Man Cree Nation, November 26, 1996, p. 38.

However, as we noted in Part I of this report, counsel for Canada indicated that, if the Commission concluded that 1887 was the appropriate date of first survey, Canada is prepared to undertake further research, including paylist analysis, to determine the First Nation's actual date-of-first-survey population. In our view, such research, to be consistent with our findings in the Fort McKay, Kawacatoose, Lac La Ronge, and Kahkewistahaw inquiries, should take into account any new adherents to treaty and transfers from landless bands who may have joined Lucky Man after 1887 and who have not received treaty land entitlement with another band. Similarly, where the research discloses that individuals should not be considered to have been members of the Lucky Man Band in 1887, or that some individuals on the 1887 paylist have already been counted elsewhere for treaty land entitlement purposes, those individuals should be excluded from the First Nation's treaty land entitlement population numbers. If the principle stated in the Lac La Ronge inquiry that "every treaty Indian is entitled to be counted - once - for treaty land entitlement purposes"[197] is consistently applied, then the unfairness suggested by the First Nation should be eliminated. The large numbers of people claimed by Lucky Man in 1880, 1882, and 1883 may not all be counted in the First Nation's treaty land entitlement population, but they will be counted *somewhere*. Similarly, if some people on those three paylists were properly members of Lucky Man in 1887 but were not counted that year, then the 1887 paylist total can be adjusted by including appropriate absentees, arrears, new adherents to treaty, and transfers from landless bands, while excluding those who were members in 1887 but who nevertheless received their treaty land entitlement elsewhere.

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[197] Indian Claims Commission, *Lac La Ronge Indian Band Report on Treaty Land Entitlement* (Ottawa, March 1996), (1996) 5 ICCP 235 at 317.

In accordance with the issues as placed before us, we do not make any findings at this time on the issue of quantifying the First Nation's claim. Our cursory review of the 1887 paylist indicates that 62 people were paid with the Lucky Man Band that year, but we know that careful paylist analysis might result in that figure being adjusted either up or down. Since the First Nation has received sufficient land for 60 people, we recommend that the parties undertake the necessary research to determine the First Nation's date-of-first-survey population. If, in the course of such negotiations, the principles from our earlier reports are properly applied to the facts of this case, we believe that the entitlement calculation will yield the proper result for the First Nation. If the parties are unable to resolve the issue through further research and negotiation, it remains open to the First Nation to request another inquiry before the Commission to quantify its claim.

PART V

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

The Commission has been asked to inquire into and report on whether the Government of Canada properly rejected the specific claim submitted by the Lucky Man Cree Nation. To determine whether the claim is valid, we have been asked to consider only one issue:

> **What is the appropriate date for calculating the Lucky Man Cree Nation's population for treaty land entitlement purposes?**

The Commission has concluded that, as a general principle, the most reasonable interpretation of Treaty 6 is that an Indian band's treaty land entitlement should be based on its date-of-first-survey population, unless there are unusual circumstances that would otherwise result in manifest unfairness.

The treaty provides that reserves are to be set apart after Canada has consulted with band members "as to the locality which may be found to be most suitable for them." The consultation contemplated by the treaty is more than the band simply indicating a general area in which it would like to have a reserve set apart; rather, Canada and the band must reach a "meeting of the minds" or consensus with regard to the specific lands to be set apart for the band's use and benefit. Canada's completion of a survey and the band's acceptance of the reserve provide conclusive evidence that both parties have agreed to treat the surveyed land as an Indian reserve for the purposes of the treaty.

In this case, we consider that the appropriate date for calculating the First Nation's treaty land entitlement population is the date of first survey of IR 116 in 1887. We do not consider that the necessary "meeting of the minds" or consensus on the selection of a specific reserve site was reached by Canada and the Band in 1880, 1882, or 1883, and for this reason we cannot conclude that Canada's failure to survey and set apart a reserve for the Band in any of those years was manifestly unfair.

"Settling down" is not a condition precedent to establishing a reserve. Nevertheless, a band may, by settling down, give a strong indication of the location in which it wants its reserve to be surveyed. Until members of the Lucky Man Band settled in 1884, they had given no specific indication of where they wanted their reserve to be located. That year, some members of the Lucky Man Band settled near Battleford in 1884 with the Little Pine Band, but, despite this indication that they had chosen a reserve site, surveyor John Nelson was asked by Little Pine to postpone the survey. We conclude that, in these circumstances, Canada was not lawfully obliged to unilaterally set apart a reserve for the Band that year. Similarly, given the turmoil of the 1885 rebellion and its aftermath, we do not consider the delay in surveying IR 116 until 1887 to have been manifestly unfair or even unreasonable.

Under the Settlement Agreement of 1989, the Lucky Man Cree Nation surrendered its interest in IR 116 in exchange for its current reserve. By agreeing to this settlement, the First Nation did not, however, agree that its treaty land entitlement should be based solely on its 1980 population of 60, nor did it forego its right to seek additional compensation in lieu of additional treaty land.

Having concluded that there are no unusual circumstances giving rise to manifest unfairness in this case, we find no reason to depart from the general principle that the Lucky Man Cree Nation's treaty land entitlement should be based on the First Nation's population as of its 1887 date of first survey.

RECOMMENDATION

Having found that 1887 is the Lucky Man Cree Nation's date of first survey and forms the appropriate basis for calculating the First Nation's treaty land entitlement, we therefore recommend:

> **That the parties undertake further research and paylist analysis on the basis of an 1887 date of first survey with a view to establishing the First Nation's proper treaty land entitlement population.**

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC
Commission Co-Chair

Carole T. Corcoran
Commissioner

Dated this 27th day of March 1997

APPENDIX A

LUCKY MAN CREE NATION TREATY LAND ENTITLEMENT INQUIRY

1 Planning conference — Saskatoon, June 18, 1996

2 Community session

At the request of the Lucky Man Cree Nation, a community session was not held in relation to this inquiry.

3 Legal argument — Saskatoon, December 3, 1996

4 Content of formal record

The formal record for the Lucky Man Cree Nation Treaty Land Entitlement Inquiry consists of the following materials:

- 8 exhibits tendered during the inquiry
- the documentary record (2 volumes of documents with annotated index)
- written submissions and supplementary written submissions of counsel for Canada and the claimant
- transcript of oral submissions (1 volume)

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.